Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

JOYCE BICKERSTAFF,

Petitioner,

v.

VASSAR COLLEGE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has *St. Mary's Honor Center v. Hicks* so changed the quantum of proof necessary under *McDonnell Douglas v. Green* to redefine the requirements of a prima facie case in discrimination law to permit the entry of summary judgment against a plaintiff who, based on counter evidence, asserts the reason advanced by the defendant is pretextual?

2. With respect to 1 above, does a split in the Circuit Courts of Appeal on the issue of the quantum of proof of pretext require this Court's intervention?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner Joyce Bickerstaff prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals affirming summary judgment in this case is reported at 196 F. 3d 435 and is reproduced in the appendix to this petition at 1a. The amendment to the opinion on denial of a motion for rehearing is reproduced in the Appendix to this petition at 71a.

The judgment of the District Court granting summary judgment in favor of the defendant is reported at 992 Fed. Supp. 372 and is reproduced in the Appendix to this petition at 45a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 12, 1999. A Petition for Rehearing was denied on December 22, 1999. The jurisdiction of this Court is conferred by 28 U.S. C., Sec. 1254 (1).

STATUTES INVOLVED

This case was brought pursuant to Title VII of the Civil Rights Act of 1964 as amended (42 U.S.C. Sec. 2000 (e) et seq.) the Equal Pay Act (29 U.S.C. Sec. 206 (d) (1) and 42

U.S.C. Sec. 1981. Relevant portions of these statutes appear in the Appendix at .

STATEMENT OF THE CASE

Vassar College, in 1971, responding to pressures originating on campus and off, sought to address the problem of race discrimination – "The American Dilemma" of the historic study by Gunnar Myrdal – by creating a program in "black studies" and recruiting African-Americans to its faculty. The college that year hired Joyce Bickerstaff, an African-American, in the rank of assistant professor on tenure track with half-time appointments in a black studies program and in the Education Department. Professor Bickerstaff played the key role in organizing and was the first chair of the Africana Studies Program (its later designation). In 1979, she was promoted to Associate Professor with tenure and has held that rank since.

In organizing the black studies program, Petitioner effectively established a new academic discipline for which she assembled source materials; she created its curriculum, and designed and taught its courses. The Africana Studies Program courses were cross-linked in the college catalogue for student credit in other departments. It was for a time the only academic unit not in the status of department, and petitioner and other members of the program were the only faculty members holding joint appointments. Now there are a number of programs in different special disciplines.

The Africana Studies Program, under critical review in 1977 and 1989 by visiting committees with members from

outside the college, received their approbation and praise. Their reviews took notice, however, of tensions occasioned by the joint appointments of faculty in the Africana Studies Program and of the discriminatory treatment of its faculty by the college administration and other faculty members. In 1985, in consequence of such tensions, petitioner sought and secured change in the division of her responsibilities, 2/3 in the Program and 1/3 in the Education Department.

In 1989, Petitioner applied for promotion to full Professor. The Ad Hoc, committee appointed in accordance with the Vassar Faculty Handbook to review her application, endorsed her promotion. The Vassar President over-ruled the Ad Hoc committee and rejected petitioner's application. Over the objection of the President, petitioner filed an administrative appeal, which she lost.

Petitioner applied again for promotion in 1994. This time, the administration convened two Ad Hoc committees, a procedure unprecedented and not provided for in the Vassar Faculty Handbook. One committee, headed by the chair of the Africana Studies Program, with faculty from other disciplines, endorsed her application; the second committee, headed by the Chair of the Education Department, rejected it. A third committee of the Faculty Appointments and Salary Committee (FASC) also voted against her promotion, relying on the recommendation of the unprecedented second committee, and refused the promotion. The President denied the promotion.

Petitioner then sued the college pursuant to Title VII and U.S.C Sec. 1981 charging race and sex discrimination.[1]

PETITIONER'S PRIMA FACIE CASE

In the discovery that followed Petitioner presented evidence establishing a prima facie case of violation of Title VII of the Civil Rights Law.

Such evidence showed that petitioner had been a leading originator with national standing of the new curriculum in black studies, now established as a program or department in the majority of leading colleges and universities. Evaluators from outside Vassar, reporting to the Ad Hoc committees, had recommended her appointment to Associate and then to full Professor. Petitioner and her colleagues in the Africana Studies Program had had occasion to protest actions of the college as based upon race prejudice. The visiting committees in 1977 and 1989 cited difficulties confronting petitioner and other African-American faculty members occasioned by their holding joint appointments and occupying second-class status and exposed to what the committees characterized as the special problems of the

---

[1] In the court below, petitioner presented proof of sex as well as race discrimination and unequal pay as compared with her male colleagues which she supported by affidavit evidence of an expert statistician establishing that not only were black faculty paid less than white faculty with particular application to petitioner, but also that female faculty at Vassar in the same ranks were paid less than males. Counsel in this petition seeks review only on the issue of race discrimination under Title VII.

relationship of white faculty to black faculty and the attendant complications of the joint appointments.

An affidavit from the current chair, not an African American, of the Africana Studies Program testified, from "team-teaching" experience with petitioner that she was a "highly effective, dedicated and innovative teacher...of unquestioned high quality as assessed by the broad range of criteria Vassar sets forth in the evaluation of teaching." He also spoke specifically of her teaching with which he was familiar since they had team-taught together. He attributed the decision not to promote her to "race and prejudice against her, based on attitudes about African Americans at Vassar."

Petitioner presented evidence that no candidate for promotion to professorial rank other than petitioner had ever had been subjected to review by two Ad Hoc committees and that the Vassar Faculty Handbook provided for one Ad Hoc committee only to evaluate a faculty member holding dual appointment in a program and a department.

In deposition a faculty colleague reported that a Vassar decision maker, the chair of the Education Department and full Professor as of 1992, had declared in departmental meetings that "It would be a crime and a disgrace" to promote petitioner to full Professor. The colleague further testified that this derogation of petitioner came of the speaker's race prejudice.

Another Vassar decision-maker, speaking of the impending review for promotion to tenure of another African-American faculty member in 1993, after Petitioner

had been turned down for promotion to full Professor in 1989, declared Vassar "could ill afford to tenure as associate professor yet another black faculty member who seems destined to be stuck in that rank forever." At that time, petitioner was the only black faculty member who had applied for promotion to full professor, so the reference was clearly to her.

The first of these decision-makers who chaired the Education Department, was also the chair of the unprecedented Ad Hoc committee that recommended against petitioner's promotion to full Professor. The second professor who had signed the report speaking of the destiny "of a black associate professor to be stuck in that rank forever" chaired the FASC committee that also ruled against petitioner's promotion.

Statistical evidence developed and presented by Mary Gray, Professor of Mathematics and Statistics at the American University in Washington D.C., showed that African-American faculty members, including petitioner, were paid less in the same rank as their non-African-American colleagues; that petitioner, in particular, was one of the lowest paid Associate Professors with one of the longest "time in rank" on the faculty, and, further, the only criterion statistically distinguishing of petitioner and her fellow African-American colleagues was race and attendant prejudice.

VASSAR'S RESPONSE

Vassar college, in response, claimed that petitioner did not meet the Vassar criteria for promotion in the main because of the low student evaluations of her teaching, the only criterion relied upon, and the paucity of her publications.

Vassar produced evidence of petitioner's student evaluations since the last review of her record for promotion, including a highly critical report of petitioner's teaching by a student affairs committee that recommended that her status as an associate professor "deserves reexamination by the college." The unfavorable recommendation of the student committee was based on limited student evaluations of only some of petitioner's courses, only her education courses, and the committee included an individual who had engaged in personal conflict with petitioner over issues of race.

PROOF OF PRETEXT

Petitioner presented evidence showing the Vassar claim to be pretext for race discrimination.

Statistical evidence developed and presented by Dr. Gray showed that student evaluations negative to petitioner were based upon race prejudice, citing higher ratings by students in the Africana Studies Program where there was a concentration of African American students and lower ratings by students in Education Department classes which included mainly white students. Other evidence adduced in discovery showed, further, that in other years, where the evidence was

available, student ratings of white faculty members, which were as low or lower than petitioner's were ignored in favorable promotion decisions and that student negative evaluations had no such ruling effect in other faculty promotions.

Additional evidence established that one of the group of student-authors of the evaluation had engaged in personal conflict with petitioner on issues of race in Africana courses and was under the influence of the chair of the Education Department who had avowed such prejudice against petitioner and with whom he shared a residence.

Responding to Vassar's derogation of her as scholar, petitioner offered evidence that she had published articles and catalogues concerned with the black experience much-needed in black studies and had a book in progress and that her publications exceeded those of the chair of the Education Department who, as of 1992 when she had been promoted to full Professor had one article only as a publication. This was the same decision-maker who had said it would be a "crime" and "disgrace" to promote petitioner to full professor.

THE DECISIONS OF THE COURTS BELOW

The district court discounted most of the Vassar criteria for promotion as "just so much bafflegab," stating "most of the published criteria are so vague and value loaded as to defy review by a trial jury" (56a) but found what it regarded as "objective" ground for denial of promotion in the student evaluations. The court accordingly granted summary judgment.

The court did not discuss or consider evidence of race prejudice proffered by petitioner as the motivation of denial of promotion to her.

The court confessed to "slight unease" in reaching its conclusion, saying "traditionally, issues such as whether plaintiff's scholarship was of 'marked distinction' or only slightly distinct would present fact questions for a jury." (58a) The court acknowledged, further, influence by the Second Circuit opinion in *Fisher v. Vassar College*, 114 F2d 1332 (1997) *cert. den.* 522 U.S. 1075 (1998) where that court said the district court should not have permitted the case to go to trial because the pretext proved "points nowhere." (46a)

The circuit court affirmed, reviewing, it said, de novo, but going far beyond the finding of the district court, making findings of fact on the disputed issues – and interpretations of those facts as though it were making jury findings.The court began its review with obeisance to the rule that all ambiguities and all reasonable factual inferences should be drawn in favor of the non-movant, here the petitioner.It then proceeded to ratify all the claims proffered by Vassar

The court affirmed the district court's dismissal of the statistical evidence on the grounds that "it failed to control for nondiscriminatory causes." The court ignored the significance of the uncontroverted facts that black faculty at Vassar was uniformly paid less than white faculty holding the same rank. In arbitrarily so ruling, in the absence of trial testimony as to the basis on which the statistician reached her conclusions, it accepted the district court's conclusion, which scanted the teaching of *Bazemore v. Friday* 478 U.S. 385,

400 (1986). *Bazemore* held that regression analyses need not include all measurable variables nor prove discrimination with scientific certainty. The circuit court, in discussing this ruling, stated that the regression analysis omitted the major variables – this all without a witness on the stand. This meant that the court accepted the affidavit testimony of a Vassar witness, which controverted plaintiff's evidence – a fact finding on a crucial issue that was a jury question.

What Dr. Gray's charts showed was that no African American achieved full professorship at Vassar during the time she was on the faculty prior to petitioner's filing suit, that all African American's were paid less than their white counterparts and that there was no other explanation than race to explain it. Further, her charts showed that petitioner in student evaluations was rated higher in her Africana courses attended by more African American students than in her white-attended Education courses, which again brought in the issue of race, disregarded by the court below.

The circuit court reviewed and discussed petitioner's affidavit testimony concerning the open prejudice of one student on the student committee (SAC) that suggested that the college review her appointment, discounting plaintiff's testimony, corroborated by the testimony of another faculty member who testified to conflict between petitioner and that student on the issue of the validity of Africana studies. The court improperly reached its own conclusions concerning the validity of petitioner's perceptions and the value of the corroborative testimony.

With respect to the affidavit of the Chair of Africana Studies attesting to the high quality of petitioner's teaching, the court simply ignored the factual aspect of the affidavit which attested to the Chair's personal knowledge of her teaching because he had "team taught" with her. This evidence controverted the testimony gleaned from negative student evaluations and raised another factual issue disregarded by the court. Although the court found that the Chair's testimony was not sufficiently "concrete," (27a) when confronted by the explicit and concretely expressed prejudice of the Chair of the Education Department and the explicit prejudice of the Chair of the Faculty Committee who was to review the decisions of the Ad Hoc committees, the court rejected that aspect of the testimony and disregarded it.. The court there, again against the clear meaning of the testimony -- it "would be a crime if Dr. Bickerstaff were made a full professor and promoted" and that "matters of race were ...relevant to her low opinion [of Bickerstaff] " – stated that such "testimony provides no *hint* as to any racial reason for [that professor's] opposition. (29a). (emphasis supplied)

In its deliberate avoidance of the significance of such a remark – it would be a "crime" and "disgrace" to promote petitioner – by a significant decision-maker, the court concluded, "[w]hile [that Education chair's] alleged comments may be rude and derogatory, Title VII is not a "general civility code." (29a).

The court again gave lip service to a consideration of petitioner's complaint that the appointment of two Ad Hoc committees to consider her promotion was a significant

departure from procedural regularity – sufficient to show that the process was tainted with prejudice, but again discounted it. (32a) There is no question that the provision in the Bylaws refers to only one Ad Hoc committee; Vassar had appointed only one Ad Hoc committee to review her promotion in 1989. Vassar chose to have two committees in 1994 so that one could be headed by a person known to be hostile to petitioner because of petitioner's race . See Bylaw (a).

The above reflects only a sample of the approach and the error of the court below in evaluating how in an important case of racial discrimination in academia by a distinguished college raises important issues as to how district and circuit courts throughout the United States should deal with motions for summary judgment where sought by defendant employers in discrimination cases.

REASONS FOR GRANTING THE WRIT

To revisit the standards of proof required in a discrimination case under Title VII after *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) with respect to the sufficiency of evidence required by the non-moving party on summary judgment

Since 1993 and *St. Mary's*, the Circuit Courts of Appeal Over the United States have been in conflict and confused concerning the quantum of proof required to rebut a prima facie case of discrimination requiring this Court's intervention and instruction

This Court in *Adickes v. S.H.Kress*, 398 U.S. 144, 158-159 (1970) established that the availability of summary judgment turned on whether a proper jury question was presented in the affidavits and evidence supported in moving papers. There the moving party's submissions did not foreclose the possibility of certain facts from which "it would be open to a jury to infer the circumstances." This court put further gloss on this holding in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) by holding that summary judgment should be granted if the moving party can make a sufficient showing that the non-movant had failed to show an element essential to the party's case on which the party bears the burden of proof at trial. *Anderson v Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986)

Since this Court's decision in *St. Mary's*, the Circuit Courts of Appeal throughout the fifty states have been in confusion over the correct standard to apply when a defendant moves for summary judgment in a discrimination case. Following *St. Mary's* district and circuit courts have made different and conflicting rulings concerning certain presumptions arising from the nature of a discrimination case, as to what constitutes a prima facie case, and as to how much and what kind of proof is required to rebut a prima facie case and to succeed on summary judgment.

To underline the importance of this issue is the decision of Judge Wald in *Aka v. Washington Hospital Center*, 156 F. 3d 1284 (USDC 1998) (in banc). There the court attempted to reconcile the diverging positions of other Circuit Courts of Appeal on the significance of a prima facie case and the sufficiency and character of the evidence both supporting it

and rebutting it. Judge Wald for seven members of the court, with four judges in two opinions vigorously dissenting, reversed a summary judgment in an age discrimination case .

As to the confusion in circuits and the divergence of reasoning as to just a few courts, *see Sheridan v. E.I. DuPont Nemours &Co.* 100 F. 3d 1061, 1066-72 (3d Cir. 1996) (in banc). *Kline v. Tennessee Valley Auth.*, 128 F. 3d 337, 342-47 (6th Cir. 1997), *Anderson v. Baxter Health Care Corp.*, 13 F. 3d 1120 , 1123-24 (7th Cir. 1994) *Washington v. Garrett*, 10 F.3d 1421, (9th Cir.1998) *Randle v. City of Aurora*, 69 F.3d 441, 451 (10th Cir. 1995).

Judge Wald found other circuits in disagreement with this reading where "genuine issues of material fact as to the falsity of the employer's explanation will not suffice alone to avoid summary judgment" *citing Hildalgo v. Overseas Condado Insurance Agencies, Inc.* 120 F. 3d 328. 335-37 (1st Cir. 1997); *Fisher v. Vassar* 114 F. 3d at 1335-38, *Rhodes v. Guiberson Oil Tools*, 75 F 3d 989,995-6 (5th Cir. 1996) (in banc) ,*Ryther v. KARE II*, 108 F. 3d 832, 836-37 (8th Cir 1997) (in banc)

Because this case is a race case and not an age or sex discrimination case it is important to go back to the seminal case that set forth the basic requirements for proof. That case just happened to involve race.

In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) this Court defined the purposes of Title VII with particular respect to race. Although the facts were dramatically different from the within case – the plaintiff

being a black mechanic who was laid off and not rehired allegedly because of race – this Court stated :

> The broad overriding interest, shared by employer, [and] employee ...is efficient and trustworthy workmanship assured through fair and racially neutral employment and personnel decisions. In implementation of such decisions, it is abundantly clear that Title VII tolerates no racial discrimination, subtle, or otherwise.

That case goes on to set up a set of circumstances that a plaintiff must establish to prove a prima facie case – for all of which the petitioner presented evidence here: she was African American, she was, according to her claim, qualified for the promotion (and she submitted evidence of her excellent qualifications by way of outside evaluators and the testimony of the chair of her program as well as her own testimony). She was denied promotion, and she presented evidence that the denial was because of her race. She showed that she had been in her grade as associate professor 16 years, longer than almost any other associate professor, that she was paid less than almost all associate professors and that discrete acts of racial discrimination had taken place.

The respondent college, in its motion for summary judgment, presented evidence that petitioner was not qualified for promotion, because, it said, she had poor student teaching evaluations and that she had not published enough, although conceding that publication was not necessarily a standard applied to all promotions.

What she had, however, beyond the above qualifications and the presumptions that a Title VII case brings is the following :

1. Direct proof from the deposition testimony of a faculty colleague that a decision-maker, head of an Ad Hoc committee reviewing her application for tenure, had publicly declared that it would be a crime and a disgrace to promote her and that this opinion was tied to the utterer's attitude about race.

2. Direct proof that a second decision-maker and chair of the FASC committee which reviewed the decisions of the two Ad Hoc committees had, two years before expressed in writing her belief that petitioner as a "black faculty member...was destined to be stuck in that rank (associate professor) forever."

3. Direct proof countering the unfavorable student teaching evaluations that a full professor who had team taught with the petitioner and observed her in the classroom considered her teaching to have met the Vassar Governance standards for excellent teaching.

4. Statistical evidence establishing by multiple regression analysis that black professors at Vassar were paid less than white professors in

> similar rank and that petitioner was paid less than white professors in the same rank.

Surely, the evidence here merited a trial by jury.

THE IMPORTANCE OF THIS CASE.

Ever since the Second Circuit decided the *Fisher* case after an in banc hearing by a vote of five to six, judges in the Second Circuit and in the district courts in the circuit have been in confusion as to what the real intention of this Court was when it decided *St. Mary's* in 1993.

Judge Brieant, in granting the summary judgment for Vassar in this case expressed his own puzzlement concerning the state of the law with respect to summary judgment. He withheld deciding the case in the hope that this Court would grant certiorari in *Fisher*, describing this case as a "reprise of *Fisher*". He said:

> In declining to review *Fisher II* our Supreme Court let stand the much criticized yo-yo rule about the shifting burden of persuasion in employment discrimination cases, referred to more euphemistically by the plaintiff's attorney as the minuet" [footnote omitted] . . .
>
> In declining to review *Fisher II* our Supreme Court also let stand a new rule in this Circuit, in which the term "prima facie case," for purposes of employment discrimination cases

> only, has been given a new meaning of some sort. This new meaning seems inconsistent with the idea that the proponent has presented sufficient evidence which, if believed, allows the trier of fact to find discrimination as an ultimate fact. *See Fisher* II, 114 F. 3d at 1386 (Winter, J.dissenting). This Cheshire Cat type prima facie case can only bring confusion to our craft. [footnote omitted] (48a,49a).

This case is not, however, a "reprise" of *Fisher*. All that the two cases have in common is the same defendant. *Fisher* concerned a claim of sex-plus in an academic appointment and prejudice in the hard sciences against married women– a claim which this Court could well not be ready to address.

The case before the Court now concerns race and discrimination against a black faculty member on the faculty at Vassar where, before this Court can hear this case , she will have taught for 28 years. She presented solid evidence in support of her claim of discrimination in the failure of the college to promote her to full professor under the same standards under which they promote white professors.

Race will continue to be on the forefront and in the agenda of our nation until we find ways to level the playing field and techniques in the law to enforce fairness. This case can be one step in that direction.

CONCLUSION

For the foregoing reasons petitioner requests this Court to issue the Writ of Certiorari to review the decision of the Second Circuit.

Respectfully submitted,

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March 21, 2000

(Any footnotes trail end of each document)

Docket No. 98-7702

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOYCE BICKERSTAFF,
Plaintiff-Appellant,

v.

VASSAR COLLEGE, Defendant-Appellee.

February 16, 1999, Argued

November 12, 1999, Decided

COUNSEL:
ELEANOR JACKSON PIEL, New York, New York, for Plaintiff-Appellant.

JAMES P. DROHAN, Fishkill, New York (Natalie Marshall, Donoghue, Thomas, Auslander & Drohan, Fishkill, New York, on the brief), for Defendant-Appellee.

JUDGES:
Before: KEARSE and SACK, Circuit Judges, and McAVOY, Chief District Judge.

OPINIONBY:

MCAVOY

OPINION:

McAVOY, Chief District Judge:

Plaintiff Joyce Bickerstaff appeals from a final judgment of the United States District Court for the Southern District of New York, Charles L. Brieant, Judge, dismissing her complaint alleging that defendant Vassar College ("Vassar") denied her request for promotion to full professor because of her race and sex, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), *42 U.S.C. 2000e* et seq. (1994). The district court granted summary judgment dismissing the complaint on the ground that Vassar had presented a sufficiently supported nondiscriminatory reason for denying Bickerstaff promotion and Bickerstaff had not produced evidence that the reason advanced was pretextual. On appeal, Bickerstaff contends that summary judgment was improper because the district court overlooked and misconstrued a vast array of evidence establishing genuine issues of material fact as to whether Vassar's decision to deny her promotion to full professor was race and sex-based. Finding no basis for reversal, we affirm.

I. BACKGROUND

The facts of this case, taken in the light most favorable to Bickerstaff as the party against whom summary judgment was granted, are as follows.

Vassar is a private educational institution, chartered in 1863, and located in Poughkeepsie, New York. Dr. Bickerstaff, an African-American female, was hired by

Vassar as a lecturer with a joint appointment in the Africana Studies Program and the Education Department in 1971.[1] Her joint appointment was originally allocated two-thirds to the Department of Education and one-third to the Africana Studies Program. That allocation was later reversed. Upon earning a Ph.D. in 1975, Bickerstaff received the rank of Assistant Professor at Vassar. In 1978, Vassar promoted Bickerstaff to the rank of Associate Professor and granted her tenure.

In 1989, Bickerstaff sought promotion to full professor, which Vassar denied. Bickerstaff appealed to Vassar's Appeal Committee ("VAC"), which rejected her challenge. No litigation ensued. Between 1989 and 1994, Bickerstaff published no scholarly articles. Bickerstaff spent the entire 1990-91 and 1991-92 academic years on leave as a visiting professor at Berea College.

In 1994, Bickerstaff again sought promotion to full professor, which Vassar denied. The present litigation ensued concerning the denial in 1994 only. We thus review Vassar's procedures for promotion and the events surrounding Bickerstaff's application in 1994 for full professor.

A. Vassar's Criteria and Procedures for Promotion to Full Professor

To achieve promotion to full professor, the Vassar Faculty Handbook requires a candidate to meet the following posted criteria:

> Continued demonstration of sound scholarship or significant artistic activity and teaching of a high quality will be

> required. It is necessary that marked distinction will have been reached in scholarship or teaching, preferably in both.
>
> An additional important consideration will be academic leadership, which may be evidenced by participation in professional activities outside the College, service on committees within the College, or contributions to educational innovation or policy making at both the departmental and college levels.

Vassar's procedures for promotion are established in its bylaws and are set forth in the Faculty Handbook For a candidate such as Bickerstaff with a joint appointment, the review is a diffusive process that involves several steps and multiple recommenders. First, "two members of rank higher than that of the member under consideration each from the home department (e.g., the chair and one other) and from the multidisciplinary program . . . meet to evaluate the professional qualifications of the candidate." Second, members of the program and the department confer and "make a written report of their deliberations," which is transmitted to the program, the department, the college-wide Faculty Appointments and Salary Committee ("FASC"), the Dean of the Faculty, and the President. Third, "the program and the department . . . take this report into consideration in making their own separate recommendations to FASC, the Dean and the President." Fourth, FASC and the Dean, upon consideration of the departmental and program recommendations, the teaching evaluation of the

Student Advisory Committee ("SAC"), the committee reports of the department and the program, and the reports of the outside evaluators,[2] make separate recommendations to the President. Lastly, the President submits her final recommendation to the Board of Trustees.

In instances "when the department or the program has fewer than two members of rank higher then [sic] that of the person under consideration, an ad hoc committee [is] formed in each case."

These procedures "are designed to accommodate recommendations from both [the] department and program." An appeal is available to VAC, comprised exclusively of members of the Vassar faculty.

B. Bickerstaff's Review for Promotion to Full Professor in 1994-1995

At issue is Bickerstaff's review for promotion to full professor over the 1994-95 academic year.

On November 14, 1994, SAC, which is charged with reviewing student Course Evaluation Questionnaires ("CEQs")[3] and issuing its analysis and recommendation on promotional applications, issued a 5-0 (with one abstention) recommendation against promotion for Bickerstaff. SAC stated that it was alarmed by Bickerstaff's recently "remarkably low" CEQs and that "the only identified trend is a steady decline in evaluations." SAC added that it "is so concerned at [Bickerstaff's] performance that it feels her present status as an associate Professor deserves reexamination by the College."

On November 28, 1994, a group consisting of the ad hoc Education Committee ("Education Committee") and the ad hoc Africana Studies Committee ("AS Committee") met to discuss Bickerstaff's qualifications for promotion. Vassar asserts that, in accordance with its bylaws, it convened the two ad hoc committees to review Bickerstaff for promotion because the Africana Studies Program and the Education Department each had fewer than two members of rank higher than hers. The meeting between the two committees was memorialized in a written report dated November 30, 1994, which generally discussed her candidacy, without reaching any firm conclusions, under the criteria of scholarship, teaching, and service.

On December 2, 1994, the three-member AS Committee unanimously recommended Bickerstaff for promotion to full professor. As past committees had done when reviewing other faculty for promotion, the AS Committee examined Bickerstaff's scholarship and teaching under a "broader" lens that it deemed more reflective of her real contributions, which included "nontraditional scholarship" and her role outside the classroom as an "educator." The AS Committee stated, in pertinent part, that:

> [Bickerstaff] more than any other faculty member in the Africana Studies Program provided the constant vision and guidance, regardless of whether she was the program director. The toll on her time and energy in establishing a new area of study at [Vassar] is another reason for viewing her scholarly contributions in a different light.

In terms of Bickerstaff's classroom teaching, however, the AS Committee did find "problems" as reflected in her CEQs. Thus, it urged her to "refocus and reinvigorate her efforts in the classroom." In the end, the AS Committee concluded that Bickerstaff had made "distinctive contributions to scholarship" and that she had "a constant and consistent educational vision through all of her work as educator, scholar, and consultant."

On December 5, 1994, the three-member Education Committee issued its report. In assessing her scholarship, it too viewed Bickerstaff's work in a "broader" context, and remarked positively on a number of Bickerstaff's specific achievements. But as to teaching, the Education Committee stated that Bickerstaff's CEQs placed her "considerably lower than what would be expected of a faculty member at Vassar in order to receive a marked distinction in teaching." In unanimously recommending against promotion, the Education Committee concluded that Bickerstaff's scholarly activities, while "creditable," did not exhibit "marked distinction" and that her teaching fell short of "marked distinction by a rather wide margin."

The three outside evaluators asked to assess Bickerstaff's scholarship and service (they were not asked to assess her teaching) unanimously recommended her for promotion to full professor. The outside evaluators commended Bickerstaff's commitment to the Africana Studies Program at Vassar and, more generally, recognized her as a national leader in her field.

Representative comments included that Bickerstaff

has "an extraordinary record of curriculum development, program innovation, and administration leadership'" that she "has excelled in . . . many areas while taking her turn as Chair of the Education Department, as Director of the Program in Africana Studies, developing a number of innovative courses at Vassar, and serving on her fair share of committees'" and that "her service record is outstanding." Notwithstanding, one outside evaluator acknowledged that she did not know Vassar's criteria for promotion. She then remarked:

> The University of Maryland would find Dr. Bickerstaff's publication record to be limited. I am unclear as to how limited publications would be viewed at Vassar.

On December 7, 1994, the three-member FASC issued its report unanimously recommending against Bickerstaff for promotion, stating that the members found that "she did not meet the stated criteria for promotion." With regard to Bickerstaff's scholarship, FASC noted that there was just one piece of traditional scholarship in her dossier. "Overall, [it] found Ms. Bickerstaff's scholarship to be exceptionally thin." With respect to her teaching, FASC noted that Bickerstaff's CEQs were declining and that, of recent, were "dismally low, among the very worst" that the FASC members had seen. It concluded that her teaching did not exhibit "high quality, much less . . . marked distinction."

On December 22, 1994, the Acting Dean, Jesse Kalin, wrote a letter to Bickerstaff informing her that

"inadvertently" some of her CEQs had not been provided to the AS Committee. The letter then told her that the AS Committee had been provided the missing CEQs and that it would be issuing an addendum report.

On January 10, 1995, the AS Committee issued its Addendum Report, which acknowledged the "mixed record" of Bickerstaff's CEQs as a whole. While noting that Bickerstaff received fours and fives[4] in sixty percent (i.e., 25/42) of the courses she had taught, it also remarked that:

> Since 1988 and her last review of promotion, we see a pattern of decline in course ratings, which became more precipitous in the last two years, 1992-1994. For example, 8 out of 16 courses that were ranked with a majority in category 3 occurred from 1988 on. Six out of those eight courses were taught from 1992 to 1994.

On January 23, 1995, a joint meeting was held in which FASC, the Dean and the President met with the AS Committee. The meeting took the form of questions from FASC, the Dean and the President, to the AS Committee. The first question posed was how the AS Committee appraised Bickerstaff's complete set of CEQs, to which the AS Committee responded that it viewed Bickerstaff's CEQs as "uneven." Specifically, the AS Committee stated that her CEQs were "strongest in the mid-to-late 1980s and showed a marked decline in the last two years." It concluded that "overall, [her CEQs were] neither strong nor poor."

Dean Kalin recommended against promotion for Bickerstaff because she did not meet the posted criteria of marked distinction in teaching. In his affidavit, he states that "her teaching evaluations are among the poorest [he has] seen in a promotional review for full professor."

On February 8, 1995, the President of Vassar wrote to Bickerstaff and informed her that she would not be recommending her for promotion to the rank of full professor. While acknowledging Bickerstaff's contribution to the Africana Studies Program at Vassar, the President expressed concerns relating to her teaching and scholarship. The President wrote that her classroom teaching was "uneven" and that "the most recent reports indicate a significant decline in classroom effectiveness." The President also stated that while she agreed with the outside evaluators that Bickerstaff's service to the educational community and to Vassar has been significant, Vassar "requires the achievement of 'marked distinction' in at least teaching or scholarship, a standard which has not yet been met." The President concluded that "while service is certainly important, it cannot alone compensate for limitations in both these areas."

Bickerstaff filed an appeal of the denial of promotion to VAC, claiming that Vassar's appointment of two ad hoc committees violated its written procedures. VAC denied the appeal, stating that in the event of a joint appointment, its written procedures provide for a recommendation from both the Africana Studies Program and the Education Department.

In the academic year 1994-95, Vassar considered

eight applications for promotion to full professor. Of the six successful candidates, five were women.

At present, Bickerstaff continues to teach at Vassar as a tenured associate professor.

C. The Present Action

Following the denial of her request in 1994 for promotion to full professor, Bickerstaff filed charges of race and sex-based discrimination with the Equal Employment Opportunity Commission. After receiving a right-to-sue letter, on November 29, 1996, Bickerstaff timely filed a complaint against Vassar in the United States District Court for the Southern District of New York. The complaint claimed that she was denied promotion to full professor in 1994 because of her race and sex, in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C.* § *2000e* et seq., and *42 U.S.C.* § *1981*. It also alleged that Vassar denied her promotion in 1994 in retaliation for her internal appeal of the denial of her promotion to full professor; and that Vassar paid her less than male professors of comparable rank, in violation of the Equal Pay Act, *29 U.S.C.* § *623*(a). The complaint sought monetary damages and an order granting her the rank of full professor at Vassar.

After discovery, Vassar moved for summary judgment on all of Bickerstaff's claims. On January 26, 1998, the district court granted Vassar's motion for summary judgment and dismissed the complaint in its entirety. See *Bickerstaff v. Vassar College, 992 F. Supp. 372 (S.D.N.Y. 1998)*. In granting summary judgment, the district court assumed arguendo that Bickerstaff had made a prima facie case of race and

sex-based discrimination. It then found Vassar had met its burden of production by articulating a sufficiently supported nondiscriminatory reason for denying Bickerstaff promotion to full professor--namely, that she did not satisfy the posted criteria for promotion. Ultimately, the district court concluded that Bickerstaff had failed to present sufficient evidence from which a reasonable juror could infer that Vassar's stated reason for not promoting her was pretextual. In reaching this conclusion, the district court noted that most of Vassar's posted criteria for promotion, like teaching of "marked distinction," are amorphous and subjective--"just so much bafflegab." *Id. at 375.* It found that the one exception to this extreme subjectivity" was that of the criterion of "teaching of a high quality." Id. Citing Bickerstaff's CEQs as an "objective" gauge of teaching ability, the district court held that no reasonable jury could find Vassar's stated reason for denying her promotion was pretextual. *Id. at 377.* Accordingly, the district court dismissed the Title VII claim for sex and race-based discrimination. For the same reason--as well as because it found that a failure to promote was not a refusal to contract -it dismissed the section 1981 claim. It also dismissed the retaliation claim for insufficiency of evidence, and the Equal Pay Act claim -to the extent it was not time barred -for insufficiency of evidence.

Bickerstaff moved for reconsideration, asserting, inter alia, that the district court had failed to draw the proper inferences from the evidence presented. In denying the motion, the district court stated that it had considered all the evidence but found that it did not raise a jury question whether Vassar's reason to deny

Bickerstaff promotion was pretextual.

This appeal followed.

II. DISCUSSION

On appeal, Bickerstaff asserts that the district court erred in granting Vassar's motion for summary judgment, asserting that it both overlooked and misconstrued a vast array of evidence establishing genuine issues of material fact as to whether race and sex were motivating factors in Vassar's decision to deny her promotion to full professor.

We review a grant of summary judgment de novo. See *Lowrance v. Achtyl, 20 F.3d 529, 534 (2d Cir. 1994)*. Under Federal Rule of Civil Procedure 56(c), summary judgment may be granted only when there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. See *Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)*. "While genuineness runs to whether disputed factual issues can 'reasonably be resolved in favor of either party,' . . . materiality runs to whether the dispute matters, i.e., whether it concerns facts that can affect the outcome under the applicable substantive law. . . . A reasonably disputed, legally essential issue is both genuine and material and must be resolved at trial." *Graham v. Henderson, 89 F.3d 75, 79 (2d Cir. 1996)* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-50, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986))*.

Title VII forbids an employer from intentionally discriminating against an employee because of that employee's "race, color, religion, sex, or national origin." *42 U.S.C. § 2000e-2*(a) (West 1997). A

violation of Title VII can be shown by either direct, statistical or circumstantial evidence. See, e.g., *Luciano v. Olsten Corp., 110 F.3d 210, 215-16 (2d Cir. 1997).*

Title VII suits fall into two basic categories: "single issue motivation" and "dual issue motivation" cases. *Renz v. Grey Adver., Inc., 135 F.3d 217, 221 (2d Cir. 1997); Fields v. New York State Office of Mental Retardation and Developmental Disabilities, 115 F.3d 116, 119-20, 124 and n.4 (2d Cir. 1997);* see also *Raskin v. Wyatt Co., 125 F.3d 55, 60 (2d Cir. 1997)* (using the less preferable labels "pretext" and "mixed motive"). In single issue motivation cases, "the single issue [is] whether an impermissible reason motivated the adverse action," *Fields, 115 F.3d at 119-20,* which courts analyze under the framework first set forth in *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973).* In dual issue motivation cases, the determination involves "both the issue of whether the plaintiff has proved that an impermissible reason motivated the adverse action and the additional issue of whether the defendant has proved that it would have taken the same action for a permissible reason[.]" *Fields, 115 F.3d at 120,* which is analyzed under the framework set forth in *Price Waterhouse v. Hopkins, 490 U.S. 228, 258, 104 L. Ed. 2d 268, 109 S. Ct. 1775 (1989)* (plurality opinion).

In the instant matter, while Bickerstaff principally treats this as a single issue motivation case pursuant to *McDonnell Douglas, 411 U.S. at 802-03,* she does make passing argument for dual issue motivation treatment under *Price Waterhouse, 490 U.S. at 258.* If there had been "policy documents [or] evidence of

statements or actions by decisionmakers [at Vassar] that may be viewed as directly reflecting the alleged discriminatory attitude," i.e., a "smoking gun," we would agree that this is a dual issue motivation case. See *Raskin, 125 F.3d at 60* (emphasis in original) (internal quotations and citation omitted). But there is not, as will be shown.

As a single issue motivation case, we apply the three-step, burden-shifting paradigm set forth in *McDonnell Douglas, 411 U.S. at 802-03*, and its progeny. See *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-510, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993); Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981)*. Under this framework, a plaintiff bears the initial burden of proving, by a preponderance of the evidence, a prima facie case of discrimination. *St. Mary's, 509 U.S. at 506*. Plaintiff's burden of establishing a prima facie case is "minimal." Id. "Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine, 450 U.S. at 254*. "To establish a 'presumption' is to say that a finding of the predicate fact (here, the prima facie case) produces a required conclusion in the absence of explanation." *St. Mary's, 509 U.S. at 506* (internal quotations and citation omitted).

Once a plaintiff has established a prima facie case, the burden of production shifts to the employer to rebut this presumption by articulating a legitimate, nondiscriminatory reason for its actions. *Fisher v. Vassar College, 114 F.3d 1332, 1335-36 (2d Cir. 1997)* (en banc) ("Fisher III"), cert. denied, *522 U.S. 1075*,

118 S. Ct. 851, 139 L. Ed. 2d 752 (1998). The defendant's burden of production also is not a demanding one; she need only offer such an explanation for the employment decision. *Fisher III, 114 F.3d at 1336.* Although the burden of production shifts to the defendant, the ultimate burden of persuasion remains always with the plaintiff. *St. Mary's, 509 U.S. at 507, 511;* see also *Norton v. Sam's Club, 145 F.3d 114, 118* (2d Cir.) ("The thick accretion of cases interpreting this burden shifting framework should not obscure the simple principle that lies at the core of anti-discrimination cases. In these, as in most other cases, the plaintiff has the ultimate burden of persuasion."), cert. denied, U.S. , *142 L. Ed. 2d 424, 119 S. Ct. 511 (1998).*

If the defendant proffers a legitimate, nondiscriminatory reason for a challenged employment action, "the presumption raised by the prima facie case is rebutted, and drops from the case." *St. Mary's, 509 U.S. at 507* (internal quotations and citations omitted). "The plaintiff then has the opportunity to demonstrate 'that the proffered reason was not the true reason for the employment decision,' and that race was." *Fisher III, 114 F.3d at 1336* (quoting *St. Mary's, 509 U.S. at 507-08).* The plaintiff's opportunity to demonstrate that the employer's proffered reason was false now merges with her ultimate burden to persuade the trier of fact that she has been the victim of intentional discrimination (i.e., that an illegal discriminatory reason played a motivating role in the adverse employment decision). n5 See *St. Mary's, 509 U.S. at 516-17, Burdine, 450 U.S. at 256; Fisher III, 114 F.3d at 1337;* see also *Hollander v. American Cyanamid Co.,*

172 F.3d 192, 200 (2d Cir. 1999).

We have previously held that:

> Though there are sentences in some opinions to the effect that a Title VII plaintiff must prove "both that the [defendant's proffered] reason was false, and that discrimination was the real reason," *St. Mary's, 509 U.S. at 515, 113 S. Ct. at 2752,* these decisions do not require a finding of [falsity] in addition to a finding of discrimination; they make the quite different point that a Title VII plaintiff may not prevail by establishing only [falsity], but must prove, in addition, that a motivating reason was discrimination. See *id. at 511.*

Fields, 115 F.3d at 120 (emphasis added); see also *Cronin v. Aetna Life Ins. Co., 46 F.3d 196, 203 (2d Cir. 1995)* ("The plaintiff is not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the 'motivating' factors."); *Sutera v. Schering Corp., 73 F.3d 13, 17 (2d Cir. 1995)* (same); *Renz, 135 F.3d at 222 n.3* ("Though a discrimination plaintiff may not succeed by proving only that a proffered explanation is false but must prove that discrimination motivated the adverse action, the plaintiff is entitled to succeed by proving discriminatory motivation without proving that a proffered explanation is false.") (citing *Fields, 115*

F.3d at 121). The opportunity presented to the plaintiff under the paradigm -to show the employer's proffered reason false--is designed simply "to sharpen the inquiry into the elusive factual question of intentional discrimination." *Burdine, 450 U.S. at 255 n.8*. The consequence of a plaintiff engaging this opportunity and demonstrating falsity is that it may (and, in most circumstances, will) advance her greater enterprise of showing discriminatory intent. See *Fisher III, 114 F.3d at 1338-40*. Thus properly understood, as the paradigm hones and sequentially narrows the factual inquiry, it extends to the plaintiff the opportunity to demonstrate that the proffered reason was false, as one means to support her ultimate burden of proving discrimination. See, e.g., *St. Mary's, 509 U.S. at 511, 517* ("Rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination. . . [but does not] compel[] judgment for the plaintiff").

Applying the paradigm to the present case, we too shall assume in Bickerstaff's favor a prima facie case of sex and race discrimination. Vassar, in turn, has satisfied its burden of production by proffering admissible evidence of a legitimate, nondiscriminatory reason for denying Bickerstaff promotion to full professor -namely, that she did not meet the posted criteria. Thus, the central question presented on this appeal is whether Bickerstaff has presented sufficient admissible evidence from which a rational finder of fact could infer that more likely than not she was the victim of intentional discrimination. See *St. Mary's, 509 U.S. at 507, 511; Fisher III, 114 F.3d at 1337; Stern v. Trustees of Columbia Univ. in the City of New York,*

131 F.3d 305, 312 (2d Cir. 1997); Renz 135 F.3d at 221-23 & n.5.

In assessing the record to determine whether there is a genuine issue to be tried as to any material fact, courts resolve all ambiguities and draw all reasonable factual inferences in favor of the party opposing the motion. See *Nora Beverages, Inc. v. Perrier Group of Am., Inc., 164 F.3d 736, 742 (2d Cir. 1998).* Moreover, as discrimination will seldom manifest itself overtly, courts must "be alert to the fact that employers are rarely so cooperative as to include a notation in the personnel file that the firing is for a reason expressly forbidden by law." *Ramseur v. Chase Manhattan Bank, 865 F.2d 460, 464-65 (2d Cir. 1989)* (internal quotation marks omitted). However, they must also carefully distinguish between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture. This undertaking is not one of guesswork or theorization. After all, "an inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact [that is known to exist]." 1 Leonard B. Sand, et al., Modern Federal Jury Instructions P 6.01, instr. 6-1 (1997). Thus, the question is whether the evidence can reasonably and logically give rise to an inference of discrimination under all of the circumstances. As a jury would be entitled to review the evidence as a whole, courts must not view the evidence in piecemeal fashion in determining whether there is a trial-worthy issue. *Stern, 131 F.3d at 314; Danzer v. Norden Sys., Inc., 151 F.3d 50, 57 (2d Cir. 1998).*

We now turn to consider whether Bickerstaff's

evidence is sufficient to create an issue of material fact as to whether she was the victim of discrimination.

A. Statistical Evidence

Bickerstaff submitted to the district court a statistical report from Professor Mary Gray, which addressed two basic questions: whether salaries at Vassar varied due to race or sex, and whether Bickerstaff's CEQs varied based on the racial makeup of her classes. With respect to the matter of salary variance, Gray employed a multiple regression analysis, a commonly accepted method of statistical analysis for examining the effect of independent variables on a dependent variable. See *Bazemore v. Friday, 478 U.S. 385, 400, 92 L. Ed. 2d 315, 106 S. Ct. 3000 (1986)* (Brennan, J., joined by all other Members of the Court, concurring in part). Gray's regressions controlled for the independent variables of experience, rank, productivity, and discipline. She concluded that "there is evidence of consistent differences in salaries based on sex and race." She also found that Bickerstaff's salary "is consistently below that predicted for her by a statistically significant amount."

As to the question of race bias affecting CEQs, Gray relied on information provided to her by Bickerstaff that "the Africana Studies courses are approximately 1/4 to 1/3 African American students whereas the courses listed in the Education Department have few, if any, African American students." After performing a "preliminary analysis" based on that information, Gray found that in eighty-three percent of the Africana Studies courses Bickerstaff had taught, she had CEQ scores in the two highest categories,

compared to only forty-two percent of the Education Department courses. Based on this evidence, Gray's Report concluded that "race is a component in [CEQs]."

It is apodictic that "statistical reports may . . . be admissible to support an inference of discrimination." *Raskin, 125 F.3d at 67* (citing *Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 307-08, 53 L. Ed. 2d 768, 97 S. Ct. 2736 (1977)*) (further citations omitted). The district court found, however, that Gray's statistical analysis did not raise such an inference because it failed to control for nondiscriminatory causes. The net import of the district court's opinion is that this flaw in the statistical evidence rendered it of no probative value to the issue of race or sex discrimination and, thus, was inadmissible.

As such a ruling is evidentiary in character, we review it for abuse of discretion. See *Hollander, 172 F.3d at 202* (citing *General Elec. Co. v. Joiner, 522 U.S. 136, , 118 S. Ct. 512, 517, 139 L. Ed. 2d 508 (1997)*). A district court has broad discretion in choosing whether to admit evidence. Id. "Although disputes as to the validity of the underlying data go to the weight of the evidence, and are for the fact finder to resolve, see *McCullock v. H.B. Fuller Co., 61 F.3d 1038, 1044 (2d Cir. 1995)*, questions of admissibility are properly resolved by the court." *Raskin, 125 F.3d at 66* (further citations omitted). The court's role is one of "a gatekeeper to exclude invalid and unreliable expert testimony." *Hollander, 172 F.3d at 202.* Further, an expert's opinion is no different than any other evidence in that it is subject to the relevancy requirement of Rule 401 of the Federal Rules of

Evidence. Id. (citing *United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986)).

Bickerstaff asserts that notwithstanding any shortcomings in Gray's statistical report, the district court erred in according it no probative weight. For this proposition, Bickerstaff relies on *Bazemore*, 478 U.S. at 400, in which the Supreme Court held that the lower courts erred in finding that a multiple regression analysis "which accounted for the major factors" lacked evidentiary value simply because the analysis failed to account for "all measurable variables." Bazemore counseled that "normally, failure to include variables will affect the analysis' probativeness, not its admissibility." Id.

The critical distinction that Bickerstaff misses, however, is that in the present case the district court did not reject Gray's regression analysis because it included less than all the relevant variables; rather, it found the evidence not probative because it omitted the major variables. See, e.g., *Koger v. Reno*, 321 U.S. App. D.C. 182, 98 F.3d 631, 637 (D.C. Cir. 1996). Thus, as we explain below, Gray's statistical analysis falls within the Bazemore exception - that "there may . . . be some regressions so incomplete as to be inadmissible as irrelevant." *Bazemore*, 478 U.S. at 400 n.10.

The starting point is to understand that salary increases at Vassar are based upon merit and seniority. Merit increases are determined on a scale of 0-8 points, based on the criteria of scholarship (0-3 points), teaching (0-3 points), and service (0-2 points). Gray's regression analysis, however, does not even purport to

account for two of these major variables--teaching and service. See *Raskin, 125 F.3d at 67-68* (citing *Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 104 L. Ed. 2d 733, 109 S. Ct. 2115 (1989)* (without a showing of causation between the challenged practice and the alleged disparities, "employers [would be] potentially liable for the myriad of innocent causes that may lead to statistical imbalances in the composition of their work forces") (internal quotations and citations omitted)); see also *Hollander, 172 F.3d at 204.* These variables are too significant not to be accounted for in the regression analysis in this case. Further, in light of the point system that Vassar employs, it cannot be said that these variables are not quantifiable or controllable. As to the remaining major variable of scholarship, though Gray attempted to account for it, she candidly admits that this variable "is not totally reliable" because she had incomplete background information on other faculty members. Even to the extent she had complete data, Gray neither explained how she ranked the publications nor whether these were the rankings that Vassar employs. See *Fisher III, 114 F.3d at 1361 n.13* (Calabresi, J., concurring in part and dissenting in part) ("What are first class reviews is not for the district court [or a statistician] to determine. That is, Vassar has a perfect right to decide for itself what its standards are and it may premise promotion on a publication in a journal that the district court thinks is awful."). We thus conclude that, because the regression analysis failed to account for the major factors that Vassar considers in evaluating salary increases, the district court did not abuse its discretion in according the regression analysis no probative weight.

Gray's statistical evidence that race bias tainted Bickerstaff's CEQs is equally infirm. First, much like her regression analysis, her so-called "preliminary" statistical analysis of race taint in the CEQs makes no effort to account for nondiscriminatory explanations for the disparity, such as class size or class level. See *Raskin, 125 F.3d at 67-68.* Without attempting to control for such other causes, her assumption that race bias affected the CEQs is untenable. See *Hollander, 172 F.3d at 202; Raskin, 125 F.3d at 67-68.* Second, Gray's statistical evidence is based upon the review of an inadequate sample of one - the plaintiff. See, e.g., *Pollis v. New Sch. for Soc. Research, 132 F.3d 115, 121-22 (2d Cir. 1997)* (collecting cases in which small sample size was found as a matter of law to render statistical evidence insufficient to support inference of discrimination). Gray did not review race as a factor tainting CEQs for the Vassar faculty as a whole, nor did she attempt an analysis of the six African-American associate professors who were reviewed for tenure on joint appointments in Africana Studies. In short, because Gray's statistical evidence does not make it more or less likely that Vassar discriminated against Bickerstaff because of her race or sex, the district court did not abuse its discretion in finding the statistical evidence of no probative value.

B. Shamba Donovan

Bickerstaff next contends that Shamba Donovan, a student member of SAC who was pursuing secondary social studies in the Department of Education, is racially prejudiced. She thus asserts that the unfavorable SAC Report, which formed part of the materials reviewed by Vassar's decision makers in

evaluating her teaching, was impermissibly tainted with race bias. As support, Bickerstaff cites to her own affidavit, which alleged that weeks before SAC issued its report, Donovan had confronted her and expressed "a hostile opinion about a new Africana Studies course that was brought before the all-college Committee on Curriculum Policy on which he was a student representative." She also cites to the deposition testimony of Daniel Perlstein, an Assistant Professor in Vassar's Education Department, who taught a course that Donovan took. Perlstein characterized Donovan as "very confrontational," one who "liked to criticize." In response to questions about Donovan's view of race, Perlstein commented that:

> [Donovan] consistently objected to an attentiveness to race, to discussing it, to students arguments of a need to combat racism. . . . His position was that the interests and issues of social and cultural racial diversity which are common at Vassar were misplaced and wrong. . . . That students and faculty . . . were too concerned of [sic] matters of difference and in particular matters of racial difference.

We recognize that the impermissible bias of a single individual at any stage of the promoting process may taint the ultimate employment decision in violation of Title VII. See *Lam v. University of Hawaii, 40 F.3d 1551, 1560 (9th Cir. 1994)*. This is true even absent evidence of illegitimate bias on the part of the ultimate decision maker, so long as the individual shown to have the impermissible bias played a meaningful role in the promotion process. For two independent reasons, we

find that there is insufficient evidence to raise a reasonable inference that such occurred in this case.

First, Bickerstaff's evidence does not allow for the reasonable inference that Donovan was biased against women or African-Americans. Donovan's mere opposition to the introduction of a new Africana Studies course he was charged with reviewing, without more, cannot rationally be considered tantamount to an expression of race animus. Neither do Perlstein's comments provide any footing to make the inferential leap that Bickerstaff desires. That Donovan was critical of the emphasis at Vassar on issues of cultural and racial diversity does not reasonably lead to the conclusion that he was in the grip of race bias. Indeed, Perlstein's testimony does not say as much.

Second, even assuming arguendo that Bickerstaff's evidence could give rise to the reasonable inference that Donovan harbored discriminatory bias, there is no evidence that Donovan played a meaningful role in the review process such that any race animus he harbored could have tainted SAC's recommendation or the ultimate promotional decision. Donovan was only one of six student members of SAC, an entity created for the narrow purpose of compiling and analyzing the CEQ data. SAC hardly had unfettered discretion in evaluating Bickerstaff for promotion; its source of information was limited to the CEQ data. The SAC Report in this case is no different than any other. SAC arrived at its recommendation after analyzing the raw data of Bickerstaff's CEQs. Based on Bickerstaff's CEQs, SAC recommended 5-0 (with one abstention) against promotion, concluding that Bickerstaff's CEQs were remarkably low in all but two categories in recent

years. In varying degrees, at least five levels of Vassar decision makers expressed the same concern over Bickerstaff's CEQs. Even the positive internal recommendation she received from the AS Committee acknowledged the precipitous decline in her CEQS.

It is noteworthy as well that Bickerstaff does not contest the validity of SAC's compilation of the raw CEQ data it reviewed. Nor has Bickerstaff otherwise explained or presented evidence addressing how Donovan's alleged race bias could have influenced SAC's recommendation. She has presented no evidence that discussions relating to her race or sex took place at a SAC meeting. Cf. *Lam, 40 F.3d at 1560* (finding that discrimination could be inferred when race-biased committee member disparaged plaintiff's abilities at committee meeting). She also has presented no argument that the SAC Report is evidence of discrimination. While Bickerstaff objects to its critical tone, Title VII does not insulate an individual from criticism that is not based on an impermissible reason.

In short, given that Bickerstaff's evidence does not support the reasonable inference that Donovan harbored discriminatory bias, and the absence of evidence establishing any causal link between Donovan's alleged discriminatory bias and Vassar's decision to deny her promotion, we find Bickerstaff's allegation that Donovan infected the promotional review process with racism insufficient to raise a question of material fact.

C. Affidavit of Lawrence Mamiya

Bickerstaff also submitted the affidavit of Professor Lawrence Mamiya, who chaired the AS Committee that reviewed Bickerstaff for promotion. Mamiya opined

that Bickerstaff "is in every way qualified for the promotion to Full Professor of Africana Studies and the Department of Education according to promotion criteria as outlined in the Faculty Handbook." His affidavit further stated that: "It is my opinion that the reason Joyce Bickerstaff was turned down for promotion to full professor is on account of race and the prejudice against her based on attitudes about African Americans at Vassar."

We have previously held that "to satisfy Rule 56(e), affidavits must be based upon 'concrete particulars,' not conclusory allegations." *Schwapp v. Town of Avon, 118 F.3d 106, 111 (2d Cir. 1997)* (quoting *Meiri v. Dacon, 759 F.2d 989, 998 (2d Cir. 1985)); Bellsouth Telecomms., Inc. v. W. R. Grace & Co., 77 F.3d 603, 615 (2d Cir. 1996)*. The problem with Mamiya's affidavit is that it contains no "concrete particulars." While his affidavit informs us that he has known Bickerstaff for more than 20 years as a colleague in the Africana Studies Program at Vassar, Mamiya fails to offer a single act, statement, or admission by any Vassar decision maker or decision making entity--or by anyone else at Vassar for that matter--to support his allegation that Bickerstaff was denied promotion to full professor because of her race. Thus, the district court properly disregarded Mamiya's allegations of race animus as conclusory.

Mamiya's affidavit is also notable for what it does not contain. His affidavit does not assert that the CEQs were tainted by race; he does not retract his Committee's statements concerning Bickerstaff's teaching that there was "a pattern of decline in [her CEQs], which became more precipitous in the last two

years;" and he does not contradict Vassar's assertion that CEQs are the chief evaluative instrument employed by Vassar to assess teaching.

D. Professor Robin Trainor

Bickerstaff next asserts that Professor Robin Trainor, the chair of the Education Committee that reviewed her for promotion, openly declared her racially prejudiced opposition to Bickerstaff prior to her 1994 candidacy for promotion. As evidence, she cites to the deposition testimony of Professor Perlstein, who testified, in pertinent part, that:

> At more than one department meeting when Miss Bickerstaff was there, [Trainor] said that it would be a crime if Miss Bickerstaff were made full professor and a disgrace. . . . [Trainor] frequently said as well that Miss Bickerstaff contributed nothing to the department or the college.

Perlstein also testified "that matters of race were, it seemed to me, relevant to her low opinion [of Bickerstaff]."

Even assuming that Trainor made the statements Perlstein attributed to her, Perlstein's testimony provides no hint as to any racial reason for Trainor's opposition. Attributing the reason to race would be based entirely on speculation, not logic. See *Fisher v. Vassar College, 70 F.3d 1420, 1442 (2d Cir. 1995)* ("Fisher I") (noting that an inference could not be drawn that "vehement" opposition "arose from impermissible bias as opposed to, for example, strong opposition on principled grounds"). Indeed, during oral

argument, Bickerstaff's counsel conceded as much but argued that Perlstein's testimony attributing Trainor's remarks to "matters of race" provides the missing link. We disagree. Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment. See, e.g., *Bellsouth Telecomms., Inc., 77 F.3d at 615* ("'It is not sufficient merely to assert a conclusion without supplying supporting arguments or facts.'") (quoting *SEC v. Research Automation Corp., 585 F.2d 31, 33 (2d Cir. 1978)*). Perlstein's testimony is just that -devoid of any concrete particulars and wholly conclusory. While Trainor's alleged comments may be rude and derogatory, Title VII is not a "general civility code." *Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201 (1998)*.

E. Report of the Visiting Committee and the Affidavit of Professor Rhett Jones

Bickerstaff next cites to the report of the Visiting Committee for Africana Studies ("Visiting Committee") that reviewed the Africana Studies Program at Vassar in 1988. Specifically, Bickerstaff relies on the statement contained in the Report that "Africana Studies has been subjected to hostilities that make it unique among academic departments and programs [at Vassar]." The Visiting Committee also remarked that it had been informed that both the former president of Vassar and faculty advisors had been unsympathetic and unsupportive of Africana Studies. It further stated that it had been told that certain departments at Vassar, such as the Art Department and the Drama Department, had expressed "some hostility toward Africana Studies."

A careful reading of the entire report reveals, however, that the Visiting Committee also noted that it "is in no position to ascertain the truth of such charges." Additionally, the Visiting Committee remarked positively in other regards, stating that "the support of the administration has been consistent, and that faculty on campus have come to favorable terms with Africana Studies." Similarly, in another section, the Visiting Committee wrote that it is "delighted to report [about] mutual admiration and support on the part of department chairs and Africana Faculty" regarding the Africana Studies Program. In the final analysis, the Visiting Committee found both positive and negative reaction to and support for Africana Studies in 1988.

But more to the point, the connection that Bickerstaff suggests--that perceived resistance to Africana Studies in 1988 is evidence that she was denied promotion in 1994 because of her race -cannot reasonably be made. The affidavit of Professor Rhett Jones, a member of the Visiting Committee, as well as an outside evaluator of Bickerstaff for promotion in 1994, does not alter this conclusion. In her affidavit, Jones asserts that Bickerstaff should have been promoted based on her achievements in Africana Studies. Yet, Jones admits that she has never observed Bickerstaff in the classroom. Jones also does not assert that she has any personal knowledge whether the attitudes observed by the Visiting Committee in 1988 persisted in 1994, much less whether they might have influenced Vassar's decision to deny Bickerstaff promotion in 1994.[6] While Vassar ultimately declined to follow Jones' outside recommendation that

Bickerstaff be promoted. Jones' statement that, "I can only assume [my recommendation] was ignored for reasons of race," is both speculative and contrary to fact. In truth, both the FASC Report and the President's letter to Bickerstaff specifically mention the consideration given to the recommendations of the outside evaluators. In declining to follow the recommendations of the outside evaluators, the President's letter stated:

> The outside reviewers place much emphasis on your service to the educational community and within the College, and we agree that this has been significant. The Governance, however, requires the achievement of "marked distinction" in at least teaching or scholarship, a standard which has not yet been met. While service is certainly important, it cannot alone compensate for the limitations in both these areas.

Thus, contrary to Jones' belief, her recommendation was not "ignored," it was just not followed by Vassar in light of its posted criteria for promotion.

In short, neither the Visiting Committee's Report in 1988 nor Jones' affidavit is sufficient to create a question of material fact whether Bickerstaff was denied promotion in 1994 because of her race.

F. Alleged Incidences of Disparate Treatment

1. The Appointment of Two ad hoc Committees

Bickerstaff next claims that the appointment of two ad hoc committees is in violation of Vassar's written procedures and is without precedent and constituted retaliation against her for having filed an appeal from her denial of tenure in 1989.

While it is true that "departures from procedural regularity . . . can raise a question as to the good faith of the process where the departure may reasonably affect the decision," *Stern, 131 F.3d at 313* (internal quotations and citation omitted), Bickerstaff has not shown that the creation of two ad hoc committees in her case was a procedural irregularity or, more importantly, that it was either race-related or motivated by retaliation First, Bickerstaff misunderstands Vassar's written procedures for promotion in connection with joint appointments. The Faculty Handbook addresses multidisciplinary programs and the process for promotions for persons holding joint appointments, and unambiguously provides for the program and department "making their own separate recommendations to FASC, the Dean and the President." Further, the Faculty Handbook plainly states that "when the department or the program has fewer than two senior members then [sic] that of the candidate for promotion, an ad hoc committee [is] formed in each case." The Faculty Handbook continues that FASC will consider "the departmental and program recommendations," and that these "procedures are designed to accommodate recommendations from both [the] department and program." Thus, in establishing two ad hoc committees and receiving separate recommendations from each, Vassar complied with its posted procedures.

Second, Bickerstaff has not presented evidence that the appointment of two ad hoc committees is unprecedented at Vassar. In her deposition, Bickerstaff admitted that there was a recommendation from the Education Department and a recommendation from the Africana Studies Program for Patricia Kauroma. Similarly, she conceded that there were separate recommendations from the Department and the Africana Studies Program for two other faculty members -Moses Nkondo and Tess Onwueme. She also admitted that the basis for her belief that the appointment of two ad hoc committees was unprecedented was limited to herself and a few others. For example, Bickerstaff points out that only one ad hoc committee was appointed to review her application for promotion in 1989. What Bickerstaff has identified, however, is an apparent procedural irregularity in her 1989 application for promotion (which application is not presently before us), rather than an irregularity in 1994. Because there were no faculty members of rank higher than hers in 1989, the director of the Africana Studies Program should have been consulted in the appointment of a committee. Thus, consistent with our previous analysis, the Faculty Handbook required the formation of two ad hoc committees in 1989. The remaining examples that Bickerstaff cites in which Vassar appointed only one ad hoc committee are inapposite; the faculty members under consideration did not hold joint appointments. Accordingly, the use of two ad hoc committees in 1994 was in conformance with the procedures outlined in the Faculty Handbook and, therefore, does not reasonably or logically form the basis of an inference of impermissible discrimination or retaliation for having filed an appeal from her denial of tenure in 1989.

2. Vassar's Treatment of CEQs

Bickerstaff next argues that Vassar departed from procedure by placing undue emphasis on her CEQs as an instrument for evaluating her teaching ability.

In support of summary judgment, Vassar submitted the affidavit of Dean Kalin, who opined that CEQs have been the primary evaluative tool used to measure teaching for the purpose of promotional decisions. According to Dean Kalin, though there is no "bright line divide" at which an applicant's CEQs evidence either marked distinction or teaching of high quality, successful applicants regularly receive seventy to eighty percent of their scores in the top two categories on the key questions of overall effectiveness of the course and overall effectiveness of the instructor. In opposition to summary judgment, Bickerstaff submitted her own affidavit stating that CEQs are not the primary instrument used to evaluate teaching and that Vassar's undue emphasis on her CEQs is evidence that she was treated differently than others.

In her deposition testimony, however, Bickerstaff admitted that Vassar relies almost exclusively on CEQs in evaluating teaching. It is beyond cavil that "a party may not create an issue of fact by submitting an affidavit in opposition to a summary judgment motion that . . . contradicts the affiant's previous deposition testimony." See, e.g., *Hayes v. New York City Dep't of Corrections, 84 F.3d 614, 619 (2d Cir. 1996)* (citations omitted). For this reason alone, Bickerstaff's affidavit does not create a genuine issue of material fact. We also note another admission by Bickerstaff confirming the consistent use of CEQs in evaluating teaching

ability. Namely, just six months before her own promotional review, Bickerstaff authored a recommendation against tenure for an African-American woman with a joint appointment, in which she herself relied considerably on CEQs in evaluating the candidate's teaching ability.

Furthermore, Bickerstaff has not otherwise shown that her CEQs were unduly emphasized in comparison to those of other candidates. Rather, the numerous promotional review materials in the record support Vassar's position that it relies predominantly on CEQs in evaluating teaching ability. The record thus shows that Bickerstaff was treated no differently than other candidates in using CEQs as the chief instrument to assess her qualifications to teach. While it is plain that Bickerstaff and others genuinely take issue with Vassar's emphasis on CEQs as the chief evaluative tool for teaching ability, such disagreement is not relevant to Bickerstaff's discrimination claim.

Bickerstaff also contends that Vassar's failure to have her full set of CEQs considered by FASC and the Education Committee is evidence of possible CEQ manipulation and bad faith. We do not believe this is the case for two reasons: first, the evidence does not support a finding of bad faith on the part of Vassar; and second, the initial omission of some of her CEQs from her review packet could not have affected the promotional decision. The allegation of bad faith finds scant support in light of the fact that once Vassar discovered the error, it took corrective action and requested the AS Committee to review Bickerstaff's complete set of CEQs and issue an addendum report. Vassar took additional remedial measures in holding a

joint meeting between the President, the Dean, FASC and the AS Committee, in which the question was posed to the AS Committee how it interpreted Bickerstaff's complete set of CEQs.

Bickerstaff also has not shown how Vassar's initial failure to include her full set of CEQs in her evaluation packet had any effect on the promotion decision. See *Stern, 131 F.3d at 313.* Putting aside the curative measures just mentioned, the simple fact is that the missing CEQs did not change the bottom line finding that all six of the decision makers at Vassar agreed upon: Bickerstaff's CEQs were at best neither "good nor bad" and were, of recent, in marked decline. Bickerstaff herself does not assert -as she cannot -that her CEQs were demonstrably superior to past successful candidates. Bickerstaff's CEQs, in fact, were appreciably lower than those of the six successful candidates in 1994, indicating that Vassar did not point falsely to her teaching ability in denying her promotion. At her deposition, Bickerstaff herself did not dispute that since 1988 there had been a pattern of decline in her CEQs that had become more precipitous in the last two years, 1992-94.

At most, Bickerstaff asserts that her overall CEQs are equal to those of a select few past successful candidates. This argument, however, overlooks that Vassar's posted criteria for promotion require "continued demonstration of . . . teaching of high quality" (emphasis supplied). Vassar alone has the right to set its own criteria for promotion and then to evaluate a candidate's fitness for promotion under them.[7] See *Gant, 630 F.2d 60 at 67* ("A university's prerogative 'to determine for itself on academic

grounds who may teach' is an important part of our long tradition of academic freedom.") (quoting *Sweezy v. New Hampshire, 354 U.S. 234, 263, 1 L. Ed. 2d 1311, 77 S. Ct. 1203 (1957)* (Frankfurter, J., joined by Harlan, J., concurring in the result)). Our role is narrowly limited to determining whether an illegitimate discriminatory reason played a motivating role in the employment decision. See *Gant, 630 F.2d at 67.* Bickerstaff has not presented evidence that an illegal discriminatory motive played a motivating role in Vassar's decision to deny her promotion. Instead, the evidence overwhelmingly supports Vassar's explanation that it denied Bickerstaff promotion for the legitimate, nondiscriminatory reason that she did not satisfy the posted criteria for promotion.

G. Bickerstaff's Affidavit

Bickerstaff next relies on her own affidavit and deposition testimony in which she stated that she had experienced feelings of isolation, hostility, and disinterest in her work in Africana Studies. We also find this tissue-thin contention unpersuasive. Bickerstaff's "[feelings and perceptions] of being discriminated against [are] not evidence" of discrimination. See *Fisher II, 70 F.3d at 1439* ("[Plaintiff's] 'sense of being discriminated against' is not evidence.").

H. Professor Ann Constantinople

The last alleged evidence of discrimination that deserves mention concerns Professor Ann Constantinople, the Chair of the FASC that

recommended against Bickerstaff for promotion. According to Bickerstaff, Constantinople joined in an expression of race bias against her. The basis for this allegation is a written statement in a 1993 FASC Report, of which Constantinople was one of four members, which addressed the tenure application of Teresa Onwueme, another African American joint appointee seeking tenure. Specifically, when reviewing Onwueme for promotion, FASC wrote: "We can ill afford to tenure as associate professor yet another black faculty member who seems destined to be stuck in that rank forever." Bickerstaff asserts that this statement refers to her and that it is a clear expression of race animus.

Bickerstaff did not, however, present this argument to the attention of the district court. See *Bickerstaff, 992 F. Supp. at 375.* Although Bickerstaff curiously annexed the FASC Report concerning Onwueme as an exhibit to her affidavit in opposition to summary judgment, she did not cite the FASC Report as evidence of an expression of race bias by Constantinople. Rather, Bickerstaff cited it for the very different proposition that Vassar denied tenure to Onwueme, despite positive recommendations from the Africana Studies Program and the Department of English. "It is the general rule . . . that a federal appellate court does not consider an issue not passed upon below . . . [unless in] the discretion of the courts of appeals . . . the proper resolution is beyond any doubt or . . . injustice might otherwise result. " *Singleton v. Wulff, 428 U.S. 106, 120-21, 49 L. Ed. 2d 826, 96 S. Ct. 2868 (1976)* (citations omitted); see also *In re Cuyahoga Equip. Corp., 980 F.2d 110, 117 (2d Cir.*

1992). As Bickerstaff did not present this statement to the district court and has made no showing of manifest injustice to permit consideration of the alleged discriminatory statement, this argument is not properly before us.

Moreover, the Constantinople statement does not lend itself to Bickerstaff's interpretation on appeal. First, despite Bickerstaff's contention that "in context the other 'black faculty member . . . [']was plaintiff," Bickerstaff Brief on Appeal at 14 n.10 (emphasis added), Constantinople's statement likely did not refer solely to Bickerstaff. Vassar's two most senior African American faculty members were associate professors. Bickerstaff had held the rank of associate professor since 1979 and Norman Hodges had been an associate professor for seven years longer than Bickerstaff. Thus, there is no reason to infer that the Constantinople statement singled out Bickerstaff.

Second, although the Constantinople statement made reference to race, the statement is a negative prediction, based on an analysis of Onwueme's work, as to Onwueme's prospects for promotion. To the extent that the phrase "seems . . . to be stuck" referred to individuals other that Onwueme, it appears to be an accurate reference to the then-status of at least Vassar's two most senior black faculty members. Constantinople testified at her deposition that in order to become a full professor, "one is theoretically expected to [make an application] after six years [as an associate professor] and every three years thereafter." Bickerstaff was not pursuing the usual timetable. She first applied for full professorship in 1989, approximately eleven years after becoming an associate professor in 1978. Further, at

the time Constantinople made the statement in 1993, Bickerstaff had already been denied promotion to full professor four years earlier, had not yet made another application for promotion at the time of the statement, and had not published any scholarly articles in the interim. In light of the foregoing and the statement's use of the word "seems," it does not appear to be a pre-judgmental prediction of an unmade application by Bickerstaff.

Third, that the Constantinople statement does not lend itself to Bickerstaff's contention on appeal is further supported by the fact that, although she made numerous other arguments in her forty page, eighty paragraph affidavit and thirty-two page memorandum of law in opposition to Vassar's motion for summary judgment, she did not think to advance this interpretation to the district court. As previously discussed, Bickerstaff submitted the FASC Report concerning Onwueme to the district court for a very different reason than that asserted here on appeal.

In the final analysis, in response to the evidence that Vassar denied Bickerstaff promotion to full professor because she did not satisfy the criteria for promotion, Bickerstaff does not present sufficient rebuttal evidence from which a rational finder of fact could infer that more likely than not Vassar intentionally discriminated against Bickerstaff because of her race or sex.[8] The district court thus properly granted summary judgment to Vassar College and dismissed Bickerstaff's Title VII and section 1981 claims. Bickerstaff's Equal Pay Act claim, which relies on the statistical evidence that we have already discussed and found that the district court properly discounted, was also properly dismissed.

CONCLUSION

We have considered all of Bickerstaff's arguments on appeal and have found them to be without merit. The judgment of the district court dismissing the complaint is affirmed.

FOOTNOTES

[1] A "joint appointment" is described in Vassar's Faculty Handbook as a "contractual agreement to divide a faculty member's responsibilities between a department and a multidisciplinary program."

[2] The Faculty Handbook provides that the Dean chooses three outside evaluators, with one evaluator being chosen from each of the separate lists of nominations for outside evaluators submitted by the program, the department and the candidate.

[3] The CEQs are completed by the students in each class at Vassar, and the questions are responded to with numerical designations on a scale from one to five, in ascendant order based upon excellence.

[4] As noted, the questions on the CEQs were responded to with numerical designations-one being the lowest and five being the highest. See e.g., supra at n.3.

[5] As noted by the District of Columbia Circuit, "the term 'pretext' can be slippery; sometimes it means that an employer's explanation is incorrect, and sometimes it means both that the explanation is incorrect and that the employer's real reason was discriminatory." *Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1288 n.3 (D.C. Cir. 1998)* (emphasis in original). We too "will avoid

using the term 'pretext', and instead refer (as appropriate) to evidence that the employer's...motivation was discriminatory." Id.

[6] Notably, while the Visiting Committee mentions departments that had been hostile to Africana Studies, the Department of Education is not one of them.

[7] As the Third Circuit has aptly articulated: Courts...should not substitute their judgement for that of the college with respect to the qualifications of faculty members for promotion and tenure. Determinations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, they must be left for evaluation by the professionals, particularly since they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges.

Kunda v. Muhlenberg College, 621 F.2d 532, 548 (3d Cir. 1980); accord *Fields v. Clark Univ., 966 F.2d 49, 54 (1st Cir. 1992),* cert denied, *506 U.S. 1052 (1993); Brousard-Norcross v. Augustana College Ass'n, 935 F.2d 974, 975-76 (8th Cir. 1991).*

Judge Calabresi has similarly noted that it is "always pernicious" for a court to set standards for the employer, and "it is particularly pernicious in academic contexts, where, second only to athletics, we all think that we are better coaches than the coaches themselves." *Fisher III, 114 F.3d at 1361 n.13* (Calabresi, J., concurring in part and dissenting in part). The Fisher III majority joined him on this point.

[8] We have considered all of the evidence in the totality in reaching our conclusion. Although the individual pieces of evidence proffered by Bickerstaff have been examined in turn, we have done so only as a matter of neccessity and practicality. As many of the pieces of evidence do not allow for the reasonable inference of discrimination, they assume in this case no super-inferential powers when viewed together. Similarly, Bickerstaff's remaining pieces of evidence that are of no probative value singularly have no greater probative value collectively.

96 Civ. 9054 (CLB)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOYCE BICKERSTAFF,
Plaintiff,

-against-

VASSAR COLLEGE,
Defendant.

January 26, 1998, Decided

January 26, 1998, Filed

COUNSEL:
For Plaintiff: Eleanor Jackson Piel, New York, Ny.

For Defendant: John M. Donoghue, Esq, Donoghue, Thomas, Auslander & Droham, Fishkill, NY.

JUDGES:
Charles L. Brieant, U.S.D.J.

OPINIONBY:
Charles L. Brieant

OPINION:

MEMORANDUM & ORDER

Brieant, J.

Before this Court for decision in this civil rights action by a faculty member against Vassar College, is a motion for summary judgment pursuant to Rule 56 Fed. R. Civ. P., heard and fully submitted for decision on December 19, 1997. This court withheld decision awaiting resolution of a Petition for Certiorari filed in Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997) (en banc), hereinafter Fisher II. Certiorari was denied on January 20, 1998. See, 139 L. Ed. 2d 752, 118 S. Ct. 851, 1998 U S. LEXIS 477. Essentially, with minor variations, this case is a reprise of Fisher II.

Plaintiff, Dr. Joyce Bickerstaff, an African-American woman, is a tenured associate professor at Vassar College with a joint appointment in the Department of Education and the Africana Studies Program. She has been a member of the Vassar faculty for 25 years. Dr. Bickerstaff twice applied for promotion to full professor, once in 1989 and again in 1994, and was denied each time. After the second denial she filed a complaint with the EEOC, and was issued a right to sue letter. She commenced this action on November 29, 1996. Dr. Bickerstaff contends that Vassar has discriminated against her because of her race and gender, and is seeking monetary damages under Title VII, 42 USC § 1981 and the Equal Pay Act.

Dr. Bickerstaff graduated from Kent State University in Kent, Ohio, where she obtained an undergraduate degree in education specializing in the field of early childhood education and child

development. She obtained a Masters Degree in Education at the University of Illinois at Champagne-Urbana in 1968, and received a Doctorate at the same University in Social Sciences in 1975. Immediately upon graduating from college, she taught in the public schools of Cleveland, Ohio, and taught at Vassar College during the summers. In the summer of 1968 she took a course at San Francisco State College, and in 1971 she attended a summer workshop course at the University of North Carolina at Greensboro. Vassar College hired Dr. Bickerstaff in 1971 as a lecturer in the Africana Studies Program and as a director of the program in elementary education within the Education Department.

It was understood originally that her joint appointment was allocated two-thirds to the Department of Education and one-third to Africana Studies. Later that allocation was reversed. In 1978 Ms. Bickerstaff was promoted to the rank of Associate Professor and was granted tenure.

In declining to review Fisher II our Supreme Court let stand the much criticized yo-yo rule about the shifting burden of persuasion in employment discrimination cases, referred to more euphemistically by plaintiff's attorney as "the minuet."[1] First, plaintiff must prove a prima facie case of discrimination by a preponderance of the evidence. To establish a prima facie case the plaintiff must show (1) that she belongs to a protected class (2) that she was qualified for the position (3) that she was denied the position and (4) that the position was ultimately filled by a person not of the protected class. Fisher II, 114 F.3d at 1335; McDonnell Douglas Corp. v. Green, 411 U.S. 792 at

802, 93 S. Ct. 1817 at 1824, 36 L. Ed. 2d 668 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 252-53, 101 S. Ct. 1089, [**4] 1093-94, 67 L. Ed. 2d 207 (1981). However, in Stern v. Trustees of Columbia University, 131 F.3d 305 (2d Cir. 1997) decided after Fisher II, the elements of a prima facie Title VII case of discrimination were listed as (1) membership in a protected class, (2) qualification for the position, (3) denial of the position and (4) the fact that the denial occurred in circumstances giving rise to an inference of discrimination on the basis of the plaintiff's membership in the protected class (citing Burdine, 450 U.S. at 253 n. 6, 101 S. Ct. at 1094; Chambers v. TKM Copy Centers Corp., 43 F.3d 29 at 37; Rosen v. Thornburgh, 928 F.2d 528, 532 (2d Cir. 1991)). See also Holt v. KMI-Continental, Inc., 95 F.3d 123, 129 (2d Cir. 1996).

A majority of the panel in Stern distinguished the en banc holding in Fisher II. We assume Fisher II still represents the law in this Circuit.

Once the plaintiff has established a prima facie case the burden shifts to the employer to produce evidence "that the adverse employment actions were taken 'for a legitimate, nondiscriminatory reason.'" St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506-07, 113 S. Ct. 2742, 2747, 125 L. Ed. 2d 407 (1993) (quoting Burdine, 450 U.S. at 254, 101 S. Ct. at 1094); Fisher II, 114 F.3d at 1335. If the defendant satisfies this burden, "the McDonnell Douglas framework-- with its presumptions and burdens-- is no longer relevant," and the plaintiff has the ultimate burden of proving that the defendant's reason was merely a pretext for discrimination. Fisher II, 114 F.3d at 1335 (quoting

St. Mary's, 509 U.S. at 510, 113 S. Ct. at 2749).

In declining to review Fisher II our Supreme Court also let stand a new rule in this Circuit, in which the term "prima facie case," for purposes of employment discrimination cases only, has been given a new meaning of some sort. This new meaning seems inconsistent with the idea that the proponent has presented sufficient evidence which, if believed, allows the trier of fact to find discrimination as an ultimate fact. See Fisher II, 114 F.3d at 1386 (Winter, J. dissenting). This Cheshire Cat type prima facie case can only bring confusion to our craft.[2]

This case involves promotion, rather than tenure, as in Fisher II, but like tenure decisions, faculty promotion decisions present unique employment issues, in that they are usually not directly competitive, they involve decentralized decision making and the consideration of numerous different factors, and they often result in disagreement because of the high stakes and the great number of variables. Zahorik v. Cornell University, 729 F.2d 85, 92-93 (2d Cir. 1984); see also Fisher v. Vassar College ("Fisher I"), 70 F.3d 1420, 1434-35 (2d Cir. 1995).

Our Court of Appeals has held that absent evidence showing that the decision was influenced directly by considerations such as sex or race "universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties or reviewing authorities." Zahorik, 729 F.2d at 94. "The Congress that brought educational institutions within the purview of Title VII

could not have contemplated that the courts would sit as 'Super-Tenure Review Committee(s).'" Lieberman v. Gant, 630 F.2d 60, 66 (2d Cir. 1980) (citing Keddie v. Pennsylvania, 412 F. Supp. 1264, 1270 (M.D.Pa. 1970)).

In the case at bar we assume Dr. Bickerstaff has met the minimal requirements of presenting a Cheshire Cat prima facie case of discrimination. She is a member of two protected classes, and she was denied the promotion for which she applied. Nothing about the denial itself raises inferences of discrimination, except that she has served so long, and sought promotion twice, unsuccessfully. The burden then shifts to Vassar to show that the decision was not a result of discrimination. Vassar states that Dr. Bickerstaff was not promoted to full professor because she:

> demonstrated neither marked distinction in scholarship nor teaching and, therefore, did not meet the College's stated qualifications for promotion to full professor.

Defendant's Answer, P 23. The burden now shifts back to Dr. Bickerstaff, who must show that this proffered reason is false and a pretext for discrimination, in order to sustain her Title VII action. Fisher II, 114 F.3d at 1339 ("We have recognized again and again that a plaintiff does not necessarily satisfy the ultimate burden of showing intentional discrimination by showing pretext alone. A finding of pretext may advance the plaintiff's case, but a plaintiff cannot prevail without

establishing intentional discrimination by a preponderance of the evidence."). The district court "must analyze the evidence, along with the inferences that may be reasonably drawn from it, and decide if it raises a jury question as to whether the plaintiff was the victim of discrimination . . . If not, the defendant is entitled to summary judgment. . ." Fisher II, 114 F.3d at 1347; Stern, 131 F.3d 305, 312.

Because this is a motion for summary judgment the record must be read in the light most favorable to the plaintiff and all permissible inferences must be drawn in her favor. Anderson v. Liberty Lobby, 477 U.S. 242, 255 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). The inferences drawn must be supported by the record, however, and the plaintiff "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1355, 89 L. Ed. 2d 538 (1986); Williams v. Smith, 781 F.2d 319, 323 (1986) ("Mere conclusory allegations or denials will not suffice.").

This Court concludes that the evidence of discrimination on the part of Vassar College that has been proffered by Dr. Bickerstaff is not sufficient to survive this motion for summary judgment. The evidence presented by Dr. Bickerstaff consists of: her own testimony as to her perception of a discriminatory atmosphere in the Education Department and perceived personal hostility toward her by Professor Robin Trainor, chair of the Education Department, the testimony of Lawrence Mamiya, a full professor in Religion and Africana Studies, stating that in his opinion Dr. Bickerstaff was not promoted because of

her race; the testimony of Daniel Perlstein, an Assistant Professor in the Department of Education, stating that Professor Trainor had a low opinion of Dr. Bickerstaff, that Trainor did not respond adequately to the complaints of two African-American students in the Spring of 1996 who felt that they were being discriminated against, that there is a high rate of failure of African-American students in the Education program, and that Shamba Donovan, one of the authors of the negative Student Advisory Committee (SAC) report mentioned below, was overtly racist.

As noted earlier, Plaintiff was denied promotion to full professor in 1989. No litigation ensued. In 1994 she made the application which is the subject of this case. Between 1989 and 1994 she published no scholarly articles. She spent the entire 1990-91 and 1991-92 academic years on leave, while serving as a visiting professor at Berea College in Kentucky. Essentially there was no significant change in her career or in her vitae between 1989 and 1994.

Vassar has posted guidelines or standards for appointment and promotion of faculty. The relevant provisions, published in the Vassar Faculty Handbook, are as follows:

> Regular full-time Appointments
>
> * * *
>
> A. Professor: Continued demonstration of significant scholarship of artistic activity [sic], and teaching of a high quality are necessary for appointment at this level. Members of the faculty of this rank shall

have achieved marked distinction in at least one of these categories, preferably both.

* * *

4. Promotion to full professor: The review will consider all professional accomplishments since the granting of tenure. Continued demonstration of sound scholarship or significant artistic activity and teaching of high quality will be required. It is necessary that marked distinction will have been reached in scholarship or teaching, preferably in both.

An additional important consideration will be academic leadership, which may be evidenced by participation in professional activities outside the College, service on committees within the College, or contributions to educational innovation or policy making at both the departmental and college levels.

* * *

II PROCEDURES FOR REVIEW OF FACULTY MEMBERS FOR REAPPOINTMENT AND PROMOTION

* * *

A. Departments

> 1. The department chair should ask department members under review to submit material pertinent to the department's consideration. Materials assembled by the chair should include up-to-date vitae, all annual activities reports, student evaluations, and all relevant evidence of scholarship or artistic activity.

Meaning no disrespect to a distinguished college, most of the criteria to be reviewed is just so much bafflegab. Like beauty, stated criteria like "marked distinction" lie in the eyes of the beholder. An exception to this extreme subjectivity is the requirement of "teaching of a high quality." As to this criterion, Vassar relies on the results of Course Evaluation Questionnaires ("CEQs") submitted anonymously by students. Plaintiff's CEQs were poor and getting poorer. The Student Affairs Committee (SAC) administers the CEQs and in the case of Dr. Bickerstaff reported to the Review committee as follows:

> . . . SAC searched for trends in Ms. Bickerstaff's CEQ's such as course load, class size, and class level. The only identified trend is a steady decline in evaluations. Specifically, in the concluding questions she received 0%

> three or lower on both question eight "about the overall effectiveness of the course," and on question nine, about "the overall effectiveness of this instructor," on her oldest report . . . whereas 76% and 72% on question eight and 71% and 81% on question nine marked three or below in her most recent reports . . . Perhaps more telling is her decline in ratings in the same classes over time.

The SAC concluded:

> SAC strongly recommends, by a vote of five to zero (with one abstention) that Ms. Bickerstaff not be promoted to full professor at this time. In fact, SAC is so concerned at Ms. Bickerstaff's performance that it feels her present status as an associate professor deserves re-examination by the College. (Boldface in original)

Recognizing that in a summary judgment case our Court of Appeals reviews the entire record de novo we spare our readers from an overly detailed recital of all the hearings, meetings and other academic procedures accorded Plaintiff on her application for promotion. By a divided vote after lengthy study and deliberation of a large number of Dr. Bickerstaff's academic peers, acting on several levels and with the aid of outside consultation, she was denied promotion to full professor.

As noted above, the Student Affairs Committee

("SAC") reviewed and analyzed the CEQs and issued a 5-0 (with one abstention) recommendation against promotion for Dr. Bickerstaff. After a meeting between the Education Program and the Africana Studies Department, the Education and Africana Studies ad hoc committees both issued their recommendations in early December. The Africana Studies committee gave a positive recommendation, but did note the Plaintiff's low CEQs and the pattern of decline in the CEQs in recent years. The committee wrote "We urge that Bickerstaff refocus and reinvigorate her efforts in the classroom." Ex. O, p. 132-33. The Education ad hoc committee recommended against promotion for the Plaintiff. It voted that her scholarship was "creditable" but did not yet exhibit "marked distinction," and that her teaching also fell short of marked distinction ". . . by a rather wide margin." Ex. I, p. 3.

On December 7, 1994, the Faculty Appointments Salary Committee ("FASC"), comprised of faculty representatives elected by their peers, unanimously found that Dr. Bickerstaff did not meet the criteria for promotion. The Committee noted Dr. Bickerstaff's low CEQs in its finding. Ex. J, p.1.

On January 23, 1995, the President of the College met with the ad hoc committee on Africana Studies, the Activity Dean and the FASC. On February 8, 1995, the College President wrote to Dr. Bickerstaff and informed her that she would not be recommended for promotion to the Board of Trustees that year. Dr. Bickerstaff filed an intramural appeal which was denied by the Appeal Committee on May 29, 1996.

While most of the published criteria are so vague

and value loaded as to defy review by a trial jury, at least the CEQs would seem to be so adverse and yet objective, as to prevent any finding of pretext. Dr. Bickerstaff seeks to meet the problem of adverse CEQs by noting that her ratings were better in her Africana classes than in her work for the Education Department and argues that student racial bias may have distorted the result. However, the race of the students reporting is not recorded by Vassar. She also points out that such ratings are not given great weight in other institutions.

There is insufficient evidence to permit this court or a trial jury to ignore the bad CEQs. At least they were an actual objective record and Vassar had the right to rely on them even if other institutions now tend to discount such evidence. As Judge Calabresi noted in his concurring opinion in Fisher II, the court should not attempt to set standards for the employer. Doing so, he wrote, "is always pernicious. It is particularly pernicious in the academic context, where, second only to athletics, we all think that we are better coaches than the coaches themselves." Fisher II, 114 F.2d at 1361 n.13 (Calabresi, J., concurring in part and dissenting in part). n3 On the totality of the evidence no reasonable juror could find that the stated grounds for the decision were pretextual. In addition, Plaintiff was not competing head to head against another applicant for full professorship either in the Education Department or the Africana Studies Program. That another person not in the protected group was promoted instead of the Plaintiff is ordinarily an essential element of a Title VII claim. It is not present here. For that reason, and also because Plaintiff has not demonstrated that Vassar's stated reasons for not promoting her, that she did not

fulfill the stated qualifications, especially with respect to teaching excellence were pretextual, Plaintiff cannot prevail. In light of Fisher II, Plaintiff's prima facie case has vanished like the Cheshire Cat, and Vassar College is entitled to summary judgment in its favor.

We confess to a slight unease in reaching this conclusion. Traditionally, issues such as whether Plaintiff's scholarship was of "marked distinction" or only slightly distinct, would present fact questions for a jury. Legal realists if any of them survive in the courts of this Circuit, might well conclude in light of Fisher I and Fisher II and the cases cited therein, that our present case law seeks to prevent mere jurors, or trial judges for that matter, from thrashing around in the sacred groves of academe looking for possible racial or gender bias, in faculty determinations made usually by a large committee on an extensive record. This may represent a practical distinction.[4] The federal employment discrimination statutes were designed to protect the millhands, with little thought to the universities which Congress need not have included, but it did. Today almost every employee is a member of a protected statutory class based on age, race, gender, national origin, handicap or perception of handicap or something else, and those few who are not can assert the judge-made protection against reverse discrimination. Juries now adjudicate the petty unfairness on the job which used to be resolved on the floor of the factory by a shouting match between the shop steward and the foreman. There may be no principled basis available to support a distinction for academic employers such as Vassar, but it certainly

seems to exist when all the cases are read together.

Miscellaneous Matters

This court agrees that failure to promote is not a refusal to contract, within 42 U.S.C. § 1981. Bennun v. Rutgers State University, 941 F.2d 154 (3d Cir. 1991) In any event, the same analysis which leads to dismissal of the Title VII claim would seem to justify dismissal of this claim.

No evidence supports a claim of retaliation for having taken an intramural appeal from the denial of promotion in 1989. This claim is dismissed.

The claimed violation of the Equal Pay Act, to the extent not time barred, also is not supported by sufficient evidence. Vassar has a structured salary plan based on seniority and a merit system. No two professors in the context of this case devote equal effort, skill, and responsibility under similar conditions. This claim is also dismissed.

Defendant's motion is granted. The Clerk shall file a final judgment.

SO ORDERED.

Dated: White Plains, New York

January 26, 1998

Charles L. Brieant, U.S.D.J.

FOOTNOTES

[1] See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973).

[2] See Lewis Carroll, Alice in Wonderland (1865), Ch. 6, "The Cheshire Cat kept appearing and vanishing so suddenly that Alice complained '... I wish you wouldn't keep appearing and vanishing so suddenly: you make one quite giddy.' 'All right,' said the cat; and this time it vanished quite slowly beginning with the end of the tail, and ending with the grin, which remained some time after the rest of it had gone. 'Well! I've often seen a cat without a grin,' thought Alice; 'but a grin without a cat! It's the most curious thing I ever saw in my life!'" The vanishing prima facie case envisioned by the majority in Fisher II may not be the most curious thing we have ever seen, but it comes close.

[3] The Fisher II majority concurred in Judge Calabresi's observation on this point.

[4] See Fisher II, 114 F.2d at 1386 (Newman Ch J. dissenting)

96 Civ. 9054 (CLB)

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOYCE BICKERSTAFF,
Plaintiff,

-against-

VASSAR COLLEGE,
Defendant.

Filed 4/16/98

In a Memorandum and Order dated January 26, 1998, 1998 WL 32481, this Court granted summary judgment pursuant to Fed. R. Civ. P. 56, dismissing the race and gender discrimination complaint filed by plaintiff Dr. Joyce Bickerstaff against defendant Vassar College. Before the Court for decision is Dr. Bickerstaff's motion, pursuant to Fed. R. Civ. P. 59(e), for a new and different judgment. Upon reconsideration, and for the reasons set forth below, the Court adheres to its previous opinion granting summary judgment to Vassar College.

Dr. Bickerstaff, an African-American woman, is a tenured professor at Vassar College holding a joint appointment in the Department of Education and the Africana Studies Program. Twice she applied for and was twice denied promotion to full professor. After the second denial she filed a complaint with the EEOC, was issued a

right to sue letter and commenced this action contending that Vassar discriminated against her because of her race and gender. She seeks money damages under Title VII, 42 U.S.C. §1981 and the Equal Pay Act Vassar College moved for summary judgment dismissing the complaint which this Court granted Familiarity with the previous opinion is assumed.

I. Rule 59 Motions

Pursuant to Fed. R Civ. P. 59(e) a party may move to alter or amend a judgment within 10 days of the filing of that judgment. Grounds for relief under Rule 59(c) are analogous to grounds for relief on a motion for reargument under Southern District Civil Rule 3(j). Cohen v. Koenig, 932 F.Supp. 505, 506 (S.D.N.Y. 1996). A court should grant a motion to reargue under Rule 3(j) only if the moving party presents matters or controlling decisions the court overlooked that might materially have influenced its earlier decision. Mores v. AT&T Information Systems 715 F.Supp. 516, 517 (S.D.N.Y. 1989) A Rule 3(j) motion is to be "narrowly construed and strictly applied and should not be used as a substitute for appealing from a final judgment. Cohen. 932 F.Supp. at 506 (citations omitted).

Plaintiff does not present any controlling decisions that this Court overlooked, but rather contends that the Court improperly applied the summary judgment standards, and did not draw the proper inferences from the evidence presented. Plaintiffs Memorandum In Support of New and Different Judgment p.1-2. Because the Court discussed the summary judgment standards in its opinion and quoted Fisher II[fn1] regarding the way in

which those standards should be applied in a college faculty discrimination case, Bickerstaff, 1998 WL 32481 at *3 it is clear that Dr. Bickerstaff's true contention is not that the Court disregarded the rules for summary judgment, but rather that it applied them improperly in her case This is a matter that should be raised on appeal.

In addition Dr Bickerstaff has not presented the Court with any new or unconsidered evidence. In support of her motion to amend this Court's decision Dr. Bickerstaff makes the conclusory statement that "[t]his Court could not have considered the voluminous affidavit and record testimony supporting plaintiffs claim of discrimination." Plaintiff's Memorandum p. 9. Contrary to this contention, the Court did consider all of the evidence along with the inferences that could be drawn from it and concluded that Dr. Bickerstaff had presented insufficient evidence for any trier of fact to ignore her low teaching ratings as evidenced by her Course Evaluation Questionnaires ("CEQ's). Even with all inferences drawn in her favor, Dr. Bickerstaff failed to show that the college's stated reason for denial of her promotion—failure to meet academic standards especially regarding her teaching — was pretextual Her CEQ's were significantly lower than the six successful candidates for full professor that year, strongly indicating that Vassar did not point falsely to her teaching in an effort to mask discrimination. Even Africana Studies, the Program which supported her promotions recognized that she received low ratings as a teacher.[fn2]

Dr: Bickerstaff's application was reviewed by six decision-making entities: the Ad Hoc Committee of the Africana Studies Program (consisting of professors Mamiya, Bergon and Flad); the Ad Hoc Committee of the Education Department (consisting of professors Trainor, Lowry and Schalk); the Student Advisory Committee (SAC) (consisting of five students); the Faculty Appointments and Salary Committee (FASC) (consisting of professors Constantinople, McCarthy and Schlessman); the Dean of the Faculty and the President of the college. Letters from outside evaluators were also considered. All six of the decision making entities noted Dr. Bickerstnffs weak reviews as a teacher and most noted the limitations in her scholarship as well (although some recommended taking a broader view of her scholarship than the traditional one). Most of the reviews commented positively on her contributions in the field of service to the College and program. However Vassar's Governance states that candidates for full professor must have achieved 'marked distinction' in either scholarship or teaching Ex. 5, Faculty Governance, Article I, Section 1(A)(1). In a letter to Dr. Bickerstaff, the president of the college. Frances Fergusson, wrote that "[t]he Governance .. requires the achievement of 'marked distinction' in at least teaching or scholarship, a standard which has not yet been met. While service is certainly important, it cannot alone compensate for the limitations in both these areas. Ex. L.

In sum, where, as here, the CEQ scores were an accepted manner of evaluating candidates for promotion. where Dr. Bickerstaff's CEQ's were declining and the CIA's of those promoted to full professor in 1994-95 were

significantly superior to her own, see Appendix A,

Defendant's Reply Memorandum of Law, and where Dr. Bickerstaff herself had used the CEQ's in negatively evaluating a different candidate, [fn 3] there can be no genuine issue of fact to be tried as to whether

[fn1]Fisher v. Vassar College. 114 F3d 1332 (2d Cir. 1997) (en banc), cert. denied, 118 S.Ct. 851(1998).

[fn2]"In terms of classroom teaching at Vassar, we do find problems reflected in her course evaluations which show a decidedly mixed reaction to her teaching. We do not know how to account adequateiy for her low CEQ ratings. We urge that Bickerstaff refocus and reinvigorate her efforts in the classroom... [S]he is still doing her job as a teacher and has not given up on the classroom, no matter what her recent difficulties may have been. Again we remind FASC and the Dean that classroom performance is only one important aspect of evaluating Ms. Bickerstaff's role as a teacher." Exh, H.

[fn3]Only six months before her own promotional review Dr. Bickerstaff signed a recommendation against tenure for Teresa Onwueme (a member of the Afrkana Studies Program and English Department) in a report which relied upon student evaluations as a princ;pal consideration for denial. The report states that·

[t]here was a general concern among all faculty members relating to Ms. Onwueme's teaching performance at Vassar as reflected in the student evaluations and the student advisory committee reports. The faculty agreed that Ms. Onwueme's teaching evaluations at Vassar are quite uneven and noted that her performance was significantly weak on most important indices... . [T]he faculty after weighing carefully all criteria and evidence as it relates to teaching is unanimous in their conclusion that Ms. Nowhere has not yet achieved the standard of excellence in teaching ordinarily expected of those seeking promotion and tenure at Vassar.

In its report the Faculty Committee in African Studies rioted that in both of her courses "a wide majority of the students

(about 65%) ranked Nowhere in the '3' and below performance rating categories of 'course and instructor effectiveness.'" See Ex.

Ms. Bicker staff's scores were even lower than those of Ms. Nowhere, According to the FASC Report 70%W of the students rated Dr. Bicker staff 3 or below on question eight regarding course effectiveness and 66% rated her 3 or below on question nine regarding teacher effectiveness. The percentages of students rating her 3 or below on these two questions were higher in the SAC Report (i.e. 76% and 72% on question eight and 71% and 81% on question nine). In either case her scores on course and instructor effectiveness were worse than those of Ms. Nowhere. Ex. 23 Vassar's explanation for denying promotion to Dr. Bickerstaff was true.

The Court also adheres to its previous ruling on Dr Bickerstaff's Equal Pay Act claims. She has presented no new evidence or controlling decisions for the Court to consider and, as noted in this Court's previous opinion, she has not shown that she was similarly situated with her comparators in terms of skill, effort devoted and responsibility. Merit increases at Vassar are based on scholarship, teaching and service (extra points can be awarded for extraordinary merit). Kalin Affidavit p.7. The information on these topics for plaintiffs comparators has not been analyzed and thus it is impossible for this Court to infer, based on the evidence presented, that Vassar has paid Dr. Bickerstaff a lower salary because of her gender. Nor do the statistical analyses performed by Mary Gray permit the Court to draw such an inference. Ms.Gray states that she included a variable in her statistical analysis for "the number of books, the number of publications in refereed

journals and as book chapters, and whether or not the faculty member had a grant." Gray Affidavit p. 3. However, Ms. Gray noted that ."[t]his variable is not totally reliable because of the inadequacy of the curriculum vitae provided to me. Thus it has been used in only some of the models." In addition Ms. Gray does not explain how she ranked the journals in which the professors in her study were published, nor does she state whether the method of ranking she used is the same one that Vassar employs.[fn4] In addition Ms. Gray's analyses do not account for teaching, one of three factors considered by Vassar in granting merit increases. In sum, Ms. Gray's statistical analyses do not adequately control for non-discriminatory factors which Vassar considers in making pay determinations and they fall to demonstrate that Dr. Bicker staff has been paid less than similarly situated male colleagues.

For the reasons stated above and because a Rule 59(e) motion should not be used as "a substitute for appealing from a final judgment," Dr. Bicker staff's motion to amend or alter this Court's previous decision is denied.

SO ORDERED.

Dated: White Plains, New York April 16, 1998

FOOTNOTES

[fn1]Fisher v. Vassar College. 114 F3d 1332 (2d Cir. 1997) (en banc), cert. denied, 118 S.Ct. 851(1998).

[fn2]"In terms of classroom teaching at Vassar, we do find problems reflected in her course evaluations which show a decidedly mixed reaction to her teaching. We do not know how to account adequately for her low CEQ ratings. We urge that Bickerstaff refocus and reinvigorate her efforts in the classroom... [S]he is still doing her job as a teacher and has not given up on the classroom, no matter what her recent difficulties may have been. Again we remind FASC and the Dean that classroom performance is only one important aspect of evaluating Ms. Bickerstaff's role as a teacher." Exh, H.

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Ms. Bicker staff's scores were even lower than those of Ms. Nowhere. According to the FASC Report 70%W of the students rated Dr. Bicker staff 3 or below on question eight regarding course effectiveness and 66% rated her 3 or below on question nine regarding teacher effectiveness. The percentages of students rating her 3 or below on these two questions were higher in the SAC Report (i.e. 76% and 72% on question eight and 71% and 81% on question nine). In either case her scores on course and instructor effectiveness were worse than those of Ms. Nowhere. Ex. 23.

[fn4]As Judge Calabresi noted in Fisher II, universities have the right to set their own standards as long as they are applied evenhandedly: "what are first-class reviews is not for the district court to determine. That is, Vassar has a perfect right to decide for itself what its standards are and it may premise promotion on a publication in a journal that the district court thinks is awful." Fisher II, 114 F.3d at 1361 n.13 (Calabresi J., cincuring).

98-7702

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOYCE BICKERSTAFF,
Plaintiff-Appellant,

v.

VASSAR COLLEGE, Defendant-Appellee.

JUDGES: PRESENT: HON. AMALYA L. KEARSE, HON. ROBERT D. SACK, Circuit Judges, HON. THOMAS J.
Cavy, District Judge.

OPINION: ORDER AMENDING OPINION

IT IS HEREBY ORDERED, that in the above-referenced matter the opinion dated November 12, 1999, is
hereby amended as follows:

The following phrase located on page 7572 of the opinion should be deleted:

"who was also unsuccessful in his application for promotion to full professor."

Accordingly, the corrected sentence should read as follows:

"Bickerstaff had held the rank of associate professor since 1979, and Norman Hodges had been an associate professor for seven years longer than Bicker staff."

Further, the petition for rehearing is in all other respects denied.

EXCERPT FROM VASSAR FACULTY HANDBOOK
1992/3

At page JA 1253 in Joint Appendix in Court below

AD HOC COMMITTEES

1. When a department or multidisciplinary program has fewer than two members of rank higher then that of the member under consideration for reappointment, promotion or tenure, an ad hoc committee of three members shall be appointed by the Dean in consultation with the Faculty Appointments and Salary Committee and with the senior department or program member, should there be one. The Committee is asked to make a recommendation in lieu of the department or program recommendation. The department or program member eligible for participation in the decision shall serve on the ad hoc committee as chair. In other instances the chair of the as hoc committee shall be appointed by the Dean.

2. The candidate shall be informed by the dean of the composition of the ad hoc committee.

3. The Dean should ask the candidate to submit materials pertinent to the ad hoc committee's review.

4. The chair writes a full statement of the ad hoc committee's recommendation, reporting the final vote, summarizing the points of view presented, including differences of opinion, if any. The statement must be read, approved and signed by all three members participation in the decision. If the vote is divided, the minority member may, with the cognizance of the other voting members, submit a confidential minority report to the Dean.

5. At the time the recommendation is submitted to the Dean of the Faculty, the candidate will be provided with a copy of the full recommendation modified so as to indicate the numerical vote but not the votes of the individual voting members. If a separate minority report is submitted, this minority report will also be provided to the candidate with the names of those signing it deleted. the chair shall also meet with the candidate to discuss this report and the remainder of the review procedure.

EXCERPT FROM LETTER DATED MAY 3, 1993 TO DEAN DYE FROM FACULTY APPOINTMENTS AND SALARY COMMITTEE CONCERNING TESS ONWUEME, CANDIDATE FOR ASSOCIATE PROFESSOR

At page JA 1536 in Joint Appendix in Court below

If her teaching is at best sound, what of her scholarship and artistic activity? Her critical essays on recent Nigerian writers seem more descriptive than analytical. They are not penetrating. Thus, we are forced to return to her plays. One outside evaluator calls her "the greatest contemporary Nigerian, indeed African, woman playwright" If true, we should grant tenure to Tess Onwneme, for though great African women dramatists must number only in the dozens, to be the greatest is no doubt a genuine achievement. But it his assessment true or merely hyperbole? We can ill afford to tenure as associate professor yet another black faculty member who seems destine to be stuck in that rank forever. We are hoping that English and African Studies are correct about Tess's talent and great future. We think we must explore this matter further with department and program.

Benjamin G. Kohl, chair
Anne P. Constantinople

Joan A. Deiters
John McCleary

42 USCS § 1981 (2000)

§ 1981. Equal rights under the law

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

42 USCS § 2000e-2 (2000)

THE CASE NOTES SEGMENT OF THIS DOCUMENT HAS BEEN SPLIT INTO 2 DOCUMENTS.
THIS IS PART 1.
USE THE BROWSE FEATURE TO REVIEW THE OTHER PART(S).

§ 2000e-2. Unlawful employment practices

(a) Employer practices. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

Supreme Court, U.S.
FILED
APR 2 4 2000
CLERK

(2)

No. 99-1555

IN THE

Supreme Court of the United States

JOYCE BICKERSTAFF,

Petitioner,

v.

VASSAR COLLEGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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17pp

QUESTION PRESENTED

Whether this Court should review the determination of the courts below that petitioner failed to present evidence from which a finder of fact could determine that she was the victim of discrimination.

RULE 29.6 STATEMENT

Respondent Vassar College is an educational corporation; it has no parent corporation and issues no stock.

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IN THE

Supreme Court of the United States

No. 99-1555

JOYCE BICKERSTAFF,

Petitioner,

v.

VASSAR COLLEGE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

Respondent Vassar College ("Vassar") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the Second Circuit in this case.

INTRODUCTION

Petitioner Joyce Bickerstaff ("Bickerstaff") brought this action under Title VII alleging that Vassar's denial of petitioner's application for promotion to full professor constituted discrimination on the basis of gender and race.[1] The

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[1] Claims under other statutes were also filed but are no longer at issue in the case. *See* Pet. at 4 n.1. We therefore do not discuss them in this Opposition.

District Court granted Vassar's motion for summary judgment, holding that on the evidence presented no reasonable jury could find Vassar's stated reasons for denying petitioner's promotion to be pretextual. Pet. App. 45a.

On appeal to the Second Circuit, petitioner asserted that the district court "overlooked and misconstrued a vast array of evidence establishing genuine issues of material fact as to whether race and sex were motivating factors in Vassar's decision to deny her promotion to full professor." *Id.* at 13a. After a thorough review of the evidence offered by petitioner, the Second Circuit agreed with the District Court that no rational finder of fact could find Vassar's reasons for denying promotion were false:

> [B]ickerstaff has not presented evidence that an illegal discriminatory motive played a motivating role in Vassar's decision to deny her promotion. Instead, the evidence overwhelmingly supports Vassar's explanation that it denied Bickerstaff promotion for the legitimate, non-discriminatory reason that she did not satisfy the criteria for promotion. [*Id.* at 38a.]

Nothing in the petition offers any reason for this Court to review the factbound decisions of the courts below. As the opinion of the Second Circuit makes plain, petitioner's complaint concerns nothing more than the application of settled law to the facts of this case. Although the petition also purports to rely on a circuit conflict, the issue discussed in the cases identified by petitioner is not at all pertinent to this case. The petition should be denied.

COUNTERSTATEMENT

Vassar College is a private educational institution, chartered in 1863, and located in Poughkeepsie, New York. Petitioner, an African-American woman, was hired by Vassar as a lecturer in 1971, and placed on a tenure-track position in 1972. Petitioner's appointment was a "joint appointment," whereby her duties were split between the Africana Studies Program and the Education Department. In 1978, Vassar

promoted petitioner to the rank of Associate Professor and granted her tenure.

In 1989, petitioner applied for promotion to full professor; her application was denied. No appeal to either the New York State Division of Human Rights or the EEOC (nor, indeed, any litigation) ensued. Pet. App. 3a. In 1994, petitioner again applied for promotion, and was again denied. *Id.* It was that denial which formed the basis for this lawsuit. Between the 1989 denial and her re-application for promotion in 1994, petitioner had produced no scholarly articles for publication. *Id.*

The promotional review process at Vassar. Vassar's procedures for promotion are established in its bylaws and set forth in its Faculty Handbook. In discussing the requirements for promotion to the rank of full professor, the Faculty Handbook states:

> [C]ontinued demonstration of sound scholarship or significant artistic activity, and teaching of a high quality will be required. It is necessary that marked distinction will have been reached in scholarship or teaching, preferably in both.
>
> An additional important consideration will be academic leadership, which may be evidenced by participation in professional activities outside the College, service on committees within the College, or contributions to educational innovation or policy making at both the departmental and college levels. [Pet. App. 3a-4a.]

For a candidate on joint appointment, such as petitioner, promotion entails a "diffusive process that involves several steps and multiple recommenders." *Id.* at 4a.. In the case of a joint appointment, the procedures "are designed to accommodate recommendations from both the department and the program." *Id.* at 5a. The promotional review process at Vassar involves a number of decision-makers from various communities at the College, departmental and program colleagues; administrators and students. In the main, the recommendations are not made by the College's administra-

tion, but by members of the faculty who are the applicant's peers.

Student views on an applicant are gathered primarily from student evaluations known as "Course Evaluation Questionnaires" or "CEQs." In completing CEQs, students respond to questions by providing a numerical designation on a scale from one to five, in ascendant order based upon excellence. Pet. App. 42a. at nn.3, 4. In addition to CEQs, the College considers (if available) departmental committee reports and a report from the Student Advisory Committee ("SAC").

Petitioner's 1994-1995 application for promotion. At the time of the petitioner's application for promotion to full professor in 1994-1995, she was not competing "head to head" against any other candidate with a joint appointment in either Africana Studies or Education. During the 1994-1995 academic year, eight associate professors were considered for promotion to full professor; six were successful. Five of the six successful candidates were women. Pet. App. 10a.-11a.

The teaching credentials of the successful candidates were variously described by the decision makers as "consistently high teaching evaluations"; "taken as a whole, a strong teaching record by a dedicated, vigorous and talented teacher"; a teaching record described as "extraordinary", with 82% responses in category "5" on the "overall effectiveness" question; a "distinguished, and not just very strong, teacher record"; and "high quality" or "distinguished" teaching. None of the successful candidates received negative recommendations from the college-wide Faculty Appointments and Salary Committee ("FASC"), SAC, or the Dean. Court of Appeals Joint Appendix ("JA") at JA1473-1478.

Both of the unsuccessful candidates for full professor in 1994-1995 received negative recommendations from FASC, the Dean, and SAC. JA20; JA1487. Both had generally positive outside evaluations (which do not comment on teaching) and a positive recommendation at the departmental or program level.

In petitioner's case, the SAC—which is charged with reviewing and analyzing CEQs and issuing its analysis and recommendation on promotional applications—issued by a vote of 5-0 (with one abstention) its report "strongly recommend[ing] * * * that Ms. Bickerstaff not be promoted to full professor at this time. In fact, SAC is so concerned at Ms. Bickerstaff's performance that it feels her present status as an associate professor deserves re-examination by the College." Pet. App. 55a. SAC also found petitioner's recent CEQs "remarkably low," and in "a steady decline." *Id.* at 54a.

Although its overall recommendation was positive, the Africana Studies departmental committee also articulated a concern over petitioner's teaching record:

> [I]n terms of classroom teaching at Vassar, we do find problems reflected in her course evaluations which show a decidedly mixed reaction to her teaching. We do not know how to account adequately for her low CEQ ratings, especially since her syllabi project sound thoughtfully organized courses. * * * We urge that Bickerstaff refocus and reinvigorate her efforts in the classroom. [JA1288.]

In an Addendum to its original report, the Africana Studies committee stated that it "[r]ecognizes the mixed record of [petitioner's] student ratings." *Id.* at JA1292; *see also* Pet. App. 9a. The Addendum also acknowledged that the pattern in petitioner's CEQs has been one of marked, recent decline, noting that "since 1988 and her last review of promotion, we see a pattern of decline in course ratings, which become more precipitous in the last two years, 1992-1994." *Id.*

The Education Department committee also found that petitioner's teaching fell short of marked distinction "by a rather wide margin." Pet. App. 7a. Its Report comments that:

> [C]areful examination of the data from the evaluations reveal that the majority of responses fall into the 3 and 4 categories and of late an increasingly large percentage in the 2 category. These ratings would place Ms. Bicker-

> staff considerably lower than what would be expected of a faculty member at Vassar in order to receive a marked distinction in teaching. In addition, as a member of an education department one is faced with the additional demand of serving as a role model for students in all courses. Thus, the presentation of material (the teaching strategies used to disseminate course content) is as important as the content itself in order for one to have credibility with students. [JA1290.]

The report recommends against promotion to full professor. JA1281.

Considering the reviews of the SAC as well as the departmental committees, the members of the FASC "agreed unanimously that [petitioner] did not meet the stated criteria for promotion." JA1322. In commenting on petitioner's CEQs, FASC observed that

> the overall ratings since 1992 are dismally low, among the very worst that we on FASC have seen. To take just one comparative indicator: of the 30 course evaluations available, nine of the 30 have a combined score of 70% (4's and 5's combined) for question #8, Course Effectiveness; and only ten of the 30 have a combined score of 70% (4's and 5's combined) for question #9, teacher effectiveness. Very poor results are recorded for both large and small classes, for classes taught once or several times, for classes in both Education and Africana Studies, and for classes taught in her areas of specialization and outside of it. [*Id.*]

Similarly, the Acting Dean of the College recommended against promoting Bickerstaff, citing the absence of the required criteria for teaching, and commenting that petitioner's "teaching evaluations are among the poorest [he has] seen in a promotional review for full professor." JA21.

The District Court's Decision. The District Court granted summary judgment to Vassar. Pet. App. 59a. The court reviewed and applied the relevant standards on a motion for

summary judgment, *id.* at 51a, as well as the decisions of this Court (and the Second Circuit) on the availability of summary judgment in Title VII cases. *Id.* 47-50a.[2]

The District Court assumed that Bickerstaff had presented a prima facie case of discrimination, and also accepted Vassar's statement of its legitimate non-discriminatory reason for denial—that appellant simply was not qualified for promotion. Pet. App. 50a. The court therefore turned to consideration of whether petitioner could show that the proffered reason "is false and a pretext for discrimination." *Id.* Reviewing the evidence, the District Court concluded that "the evidence of discrimination on the part of Vassar College that has been proffered by Dr. Bickerstaff is not sufficient to survive this motion for summary judgment." *Id.* at 51a. Although it was concerned that that "most of the published criteria" for promotion enumerated by Vassar were subjective in nature, the court held that the appellant's poor CEQs constituted an "actual objective record" on which Vassar has a right to rely, *id.* at 57a, in denying promotion. "On the totality of the evidence," the court concluded, " no reasonable juror could find that the stated grounds for the decision were pretextual." *Id.*

The Second Circuit's Decision. Like the District Court before it, the Second Circuit set out the settled standards for summary judgment in an employment discrimination case as articulated by this Court in decisions such as *McDonnell Douglas* and *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993). Pet. App. 15a. It noted that "the central question presented on this appeal is whether Bickerstaff has presented

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[2] Petitioner argues that the District Court's purported "puzzlement concerning the state of the law with respect to summary judgment" is a reason to grant review. Pet. at 17. The court's colorful reference to "a yo-yo rule about the shifting burden of persuasion in employment discrimination cases" was nothing more than a reference to the settled rule of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), *see* Pet. App. 47a & n.1, and does not demonstrate any "puzzlement," let alone a reason to grant certiorari.

sufficient admissible evidence from which a rational finder of fact could infer that more likely than not she was the victim of intentional discrimination." *Id.* at 18a.

The Second Circuit assumed that petitioner had made out a prima facie case and found that Vassar had met its burden to articulate legitimate non-discriminatory reasons for its decision to deny her promotion. The court then proceeded to evaluate the various proof proffered by Bickerstaff to demonstrate discrimination. It affirmed the District Court's determination that petitioner's statistical evidence was flawed and therefore not admissible. *Id.* at 24a. It rejected the allegation that one student "poisoned" the SAC summary of petitioner's poor CEQs because the statements attributed to the student at issue did not indicate race bias and because the SAC report was in any event based on petitioner's admittedly poor CEQs. It noted that "in varying degrees, at least five levels of Vassar decision makers expressed the same concern over Bickerstaff's CEQ's." *Id.* at 27a.

The Court also examined an affidavit by a sympathetic colleague in the Africana Studies Department, and found it bereft of any "concrete particulars" regarding racial animus. *Id.* at 28a-29a. It similarly found that a remark attributed to the Chair of the Education Department—to the effect it would be a "crime" if petitioner were to make full professor—was not evidence of race discrimination because it contained no linkage to race bias. *Id.* at 29a-30a. The Second Circuit likewise found no evidence that Vassar's decision not to follow the recommendation of an outside evaluator was tainted by racial bias but rather rested on the fact that the evaluator did not assess petitioner under Vassar's posted criteria for promotion. *Id.* at 32a.

The court of appeals found the allegedly "unprecedented" appointment of two "ad hoc" committees to review petitioner's candidacy neither unprecedented nor irregular, since Vassar's Faculty Handbook specified that its promotional "procedures are designed to accommodate recommendations from both [the] department and program." *Id.* at 33a.

Finally, the court rejected any claim that CEQs were unfairly emphasized in evaluating her teaching ability, because (a) petitioner admitted at her deposition "that Vassar relies almost exclusively on CEQ's in evaluating teachers"; (b) petitioner herself authored a recommendation against tenure for an African-American woman with a joint appointment, relying considerably on CEQs in evaluating that candidate's teaching; (c) the numerous promotional materials in the record overwhelmingly established candidates for promotion had their teaching skills assessed by CEQs. *Id.* at 35a-38a.

REASONS FOR DENYING THE WRIT

I. THE PETITION COMPLAINS ONLY OF THE APPLICATION OF SETTLED LAW TO THE FACTS OF THIS CASE

The errors asserted in the petition are simply allegations of factual error or of misapplication of settled law to the facts and are not appropriate for this Court's review. *See* S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

As is evident from a review of the Second Circuit's decision, in the courts below this case turned on the factually-focused question "whether Bickerstaff has presented sufficient admissible evidence from which a rational finder of fact could infer" that she was the victim of discrimination. Pet. App. 18a. In considering that question, the Court of Appeals first set forth settled law concerning summary judgment under the burden shifting framework of *McDonnell Douglas*. *Id.* at 15a. It made no mention of any disputed legal issue or circuit conflict, but simply recited the appropriate legal analysis. It did not discuss or reject any proposition of law on which Bickerstaff had based her appeal, and for good reason: as noted, her appeal was based simply on her con-

tention that summary judgment was not appropriate on these facts under undisputed principles of law.[3]

Having articulated the appropriate and settled standards, the Second Circuit then undertook to review—in great detail—each piece of evidence on which Bickerstaff relied for her contention that summary judgment should not have been granted. *See* Pet. App. 20a-41a. Like the District Court before it, the Second Circuit found no evidence that the reason advanced by Vassar for declining to promote petitioner was false or pretextual, and it therefore affirmed the judgment of the District Court. *Id.* at 42a.

While petitioner obviously disagrees with the conclusions of the courts below concerning the failure of her evidence to defeat summary judgment, *see* Pet. 17 ("Surely, the evidence here merited a trial by jury."), that disagreement provides no basis for this Court's intervention.

II. THIS CASE PROVIDES NO OPPORTUNITY TO RESOLVE THE PURPORTED CONFLICT DISCUSSED IN THE PETITION

Petitioner argues that certiorari should be granted to "revisit the standards of proof required in a discrimination case under Title VII after *St. Mary's Honor Center* v. *Hicks*, 509 U.S. 502 (1993), with respect to the sufficiency of evidence required by the non-moving party for summary judgment." Pet. at 12. In particular, she seeks to have this Court review an issue which she contends has divided the lower courts: whether, under *Hicks*, a plaintiff can always avoid summary judgment by creating a genuine issue concerning whether the employer's stated decision for the employment decision is false. *See Aka* v. *Washington Hospital Center*, 156 F.3d 1284, 1289-1290 (D.C. Cir. 1998).

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[3] Indeed, the Petition itself appears to concede that the Second Circuit applied settled law on summary judgment, noting that "the court began its review with obeisance to the rule that all ambiguities and all reasonable factual inferences should be drawn in favor of the nonmovant." Pet. at 9.

The record in this case, however, will not present the Court with an opportunity to resolve that question, even if it were otherwise appropriate for an exercise of the Court's jurisdiction, because there is no contention here that Vassar's stated reasons for rejecting petitioner's bid for a promotion were false. Both the courts below assumed that petitioner had met her burden to demonstrate a prima facie case and found that Vassar had met "its burden of production by proffering admissible evidence of a legitimate, nondiscriminatory reason for denying Bickerstaff promotion to full professor." Pet. App. 18a. Bickerstaff did not attack this statement of reasons as false or pretextual; she simply responded with (inadequate) evidence designed to meet her ultimate burden of persuasion.

The Second Circuit in this case therefore was not presented with the issue discussed in the cases on which petitioner relies. In fact, in each of those cases where the court of appeals ruled in favor of the employee, the court had found the existence of issues of fact regarding the falsity of the employer's statement of reasons for the challenged action. In *Sheridan* v. *E.I. DuPont de Nemours*, 100 F.3d 1061 (2d Cir. 1996), *cert. denied*, 521 U.S. 1129 (1997), the Third Circuit sustained a jury's determination that the employer's proffered reason was pretextual; in *Kline* v. *Tennessee Valley Authority*, 128 F.3d 337 (6th Cir. 1997), the Sixth Circuit affirmed a trial court's disbelief of the employer's proffered reason for not selecting the employee; in *Washington* v. *Garrett*, 10 F.3d 1421 (3d Cir. 1993), the Ninth Circuit rejected the Government's asserted reason for abolition of the position; and in *Randle* v. *City of Aurora*, 69 F.3d 441 (10th Cir. 1995), a genuine issue of fact was found to exist on the failure to promote and race discrimination claims.

Because the employees in these cases submitted evidence sufficient to permit a finding that the employers' proffered reasons were not the real reason for the adverse employment action, these courts have been required to decide whether such evidence alone is always sufficient to defeat summary judgment. *See Aka* v. *Washington Hospital Center*, 156 F.3d

1284 (D.C. Cir. 1998) (discussing issue whether plaintiff can always succeed "in fending off summary judgment if he can demonstrate a genuine issue of material fact as to whether the employer's stated reason for its employment reason is the real reason.") The issue does not arise where, as here, the employee is unable to offer evidence of falsity but simply responds with what she views as evidence of discrimination.

At the end of the day, petitioner simply seeks a further review of the facts by this Court. The Court should, accordingly, decline to exercise jurisdiction and deny the petition.

CONCLUSION

For all the foregoing reasons, the petition should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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PETITIONER'S RESPONSE TO BRIEF IN OPPOSITION

This summary judgment in a discrimination case predicated on the race of the petitioner, a tenured associate professor at Vassar College where she was denied promotion to full professor, raises three intertwined issues of compelling importance to this Court.

First petitioner raises an issue pivotal in all summary judgment cases under Federal Rule 56 (c) as to the sufficiency of the evidence to warrant a denial of trial on the issues posed, an issue which this Court has often addressed to assure a litigant of her right to a trial by jury guaranteed her under Congress' amendment in 1991 of the Civil Rights Act as well as the Seventh Amendment See *Adickes v. Kress*, 398 U.S. 142, 158,159 (1970); *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 247-50 (1986); *Celotex v. Catrett*, 477 U.S. 317, 322 (1986).

Second, there is the specific issue of the sufficiency of evidence in a discrimination case under Title VII, where the plaintiff has alleged that the employer's asserted reason for the unfavorable employment decision is a pretext for discrimination -- an issue which has plagued the federal courts and which has the Circuit Courts of Appeal in confusion, particularly since this Court decided *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). *cf. Developments in Employment Discrimination,* 109 Harvard L. R. 1571, 1597 (May 1996).

Third, this case is about race and how a distinguished educational institution has managed to demonstrate its race prejudice against a faculty member it was pressured by student unrest twenty-five years ago to hire for the purpose of creating a program emphasizing black studies and in that connection promoted her to an associate professorship

with tenure. Thereafter, however, it demonstrated its race prejudice against her by refusing in due course to promote her to the full professorship she was qualified to receive. Material evidence by way of documents, affidavits and deposition testimony offered by petitioner in opposition to the motion for summary judgment was ignored, distorted and scanted by the appellate court, including proof that, at the time petitioner applied for promotion, Vassar had no African American full professors on its faculty.

As to the Second issue – the pretext petitioner charges Vassar with, based on the claim that her teaching did not meet Vassar's standards for promotion because her student evaluations were poor, petitioner produced evidence from the files of Vassar that other white faculty were promoted to full professorships with similar or lower student evaluations. (A. 292-93,300-01. 304.306.308,412.453-54, 713). Low student evaluations were cited by the district court as the sole ground for its ruling since that court found that the other criteria for promotion were so much "bafflegab" (54a). In so ruling the district court and the court below ignored contrary evidence by a distinguished professor, chairman of the Africana Studies Program and a decision-maker who had team-taught with petitioner, and who testified by affidavit from his experience teaching with her that petitioner was a highly effective, dedicated and innovative teacher who met Vassar's criteria for promotion. (A1129)

The Second Circuit decision below is replete with fact-findings favorable to Vassar on disputed factual issues; the court made fact-findings instead of identifying triable issues.

The court rejected expert regression analysis that established that all of the black faculty at Vassar, and particularly petitioner, was paid less than the white faculty by a statistically significant amount as proof of discrimination on the grounds that the evidence was not probative because it

omitted major variables. (22a) Although the court paid lip-service to *Bazemore v. Friday*, 478 U.S 385 (1986), it failed to recognize that a statistic which showed all African American faculty on a lower pay scale from the white faculty had a significance of its own.

Classic examples of blindness to the racial prejudice demonstrated by Vassar appear throughout the opinion of the court below. One example is noteworthy for its casuistry with respect to the evidence offered by petitioner to prove race was the real reason her promotion was rejected:

> Claiming that it was "carefully distinguish[ing] between evidence that allows for a reasonable inference of discrimination and evidence that gives rise to mere speculation and conjecture," (19a) the court stated:
>
> "Bickerstaff next asserts that Professor Robin Trainor, the chair of the Education Committee that reviewed her for promotion, openly declared her racially prejudiced opposition to Bickerstaff prior to her 1994 candidacy for promotion. As evidence, she cites to the deposition testimony of Professor Perlstein, who testified, in pertinent part, that:
>
> At more than one department meeting when Miss Bickerstaff was there, [Trainor] said that it would be a crime if Miss Bickerstaff were made full professor and a disgrace...[Trainor] frequently said as well that Miss Bickerstaff contributed nothing to the department or the college.

> Perlstein also testified 'that matters of race were it seemed to me, relevant to her low opinion [of Bickerstaff]. '
>
> Even assuming that Trainor made the statements Perlstein attributed to her, *Perlstein's testimony provided no hint as to any racial reason for Trainor's opposition.* Attributing the reason to race would be based entirely on speculation, not logic. (Emphasis supplied) (29a)

Respondent's counterstatement of the facts rehashes and sets forth again the movant's evidence that petitioner was not, after 16 years as an associate professor at Vassar, qualified for promotion, stating that the Second Circuit's decision turned on "the factually focused question ' whether Bickerstaff has presented sufficient admissible evidence from which a rational finder of fact could infer' that she was a victim of discrimination." In Point II, however, it is clear that respondent has missed the thrust of petitioner's argument. The brief argues at page 11 that

> "The record in this case, however, will not present the Court with an opportunity to resolve that question [revisiting the standards of proof after *St. Mary's* with respect to the sufficiency of evidence required by the non-moving party for summary judgment] because there is no contention here that Vassar's stated reasons for rejecting petitioner's bid for a promotion were false."

Falsity of motive and the facts asserted by the respondent were the gravamen of petitioner's case in the district court and on appeal.

Even if, arguendo, the fact that petitioner had poor student teaching evaluations, would have been a non-discriminatory reason for denying her promotion, the direct evidence of racial discrimination she produced entitled her to consideration as a "mixed motive" case, an issue argued on appeal, but never addressed by the court below. See *Price Waterhouse v. Hopkins,* 490 U.S. 228, 270-77 (1989); Michael A. Subrensky, Note, *Despite the Smoke, There Is No Gun: Direct Evidence Requirements in Mixed- Motives Employment Law After Price Waterhouse v. Hopkins,*46 Stan. L. Rev, 959, 970-78 (1994)

Respondent fails to recognize that the entire thrust of the evidence produced below by petitioner was offered to prove that "Vassar's stated reasons for rejecting petitioner's bid for a promotion were false" and that the reliance on student evaluations as opposed to faculty observation of the teaching competence of the petitioner, the failure to consider other aspects of petitioner's teaching, the failure to follow the rules for ad hoc committee consideration, (creating two ad hoc committees for review instead of one as required by the Faculty Handbook) and the stated and recorded race - prejudiced remarks of the decision-makers , directed at petitioner, underlined the falsity of the respondent's position.

The district court and the Court of Appeals affirmance of the summary judgment order was based on accepting all of the moving party's fact contentions despite the nonmovant's challenge to those contentions by counter facts in the nature of direct evidence of racial prejudice in multiple incidents.

At page 11 of Vassar's Brief in opposition, respondent states that the court below was not presented with the issues argued here because "in each of the cases [urged by petitioner] where the courts ruled in favor of an employee,

the court found the existence of issues of fact regarding the falsity of the employer's statement of reasons for the challenged action." Accordingly avows respondent, "these courts," the ones cited by petitioner in his petition to this Court, "have been required to decide whether such evidence alone is always sufficient to defeat summary judgment."

This Court should note that *au contraire*, that is precisely what petitioner argued below and urges here.

What respondent has failed to understand, or guilefully would mislead this Court, is that evidence of discrimination as presented by petitioner necessarily rebuts Vassar's claim that it honestly rejected petitioner's application for promotion on judgment grounds applied equally to white faculty.

This claim of petitioner raises the pretext issue ---which is added to the prima facie case for discrimination found by the courts below. Has she shown pretext only, or pretext plus? Having presented such pretext evidence in opposing the motion for summary judgment, has petitioner met the standard this Court thought to establish in *St. Mary's*, or is something more required of petitioner before she is entitled to a trial to test the evidence she advanced in opposition to the motion for summary judgment?

CONCLUSION

For all the reasons stated in her petition and this brief, this Court should issue the Writ of Certiorari to review the judgment of the court below.

Respectfully submitted,

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